CLERK'S COPY

[redacted]

No. [redacted]

[redacted]

[redacted] SOMERS, AUDITOR OF PUBLIC ACCOUNTS AND EX-OFFICIO [redacted] COLLECTOR, APPELLANT,

vs.

[redacted] G. WIENER, WILLIAM B. WIENER AND JACQUES L. WIENER

APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

FILED AUGUST 4, 1913.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 252

J. HOWELL FLOURNOY, SHERIFF AND EX-OFFICIO TAX COLLECTOR, APPELLANT,

vs.

SAMUEL G. WIENER, WILLIAM B. WIENER AND JACQUES L. WIENER

APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

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IN THE FIRST JUDICIAL DISTRICT COURT OF LOUISIANA, PARISH OF CADDO

MINUTES OF THE COURT

Shreveport, Louisiana,
Monday, Sept. 21st, 1942.

STATE OF LOUISIANA,
Parish of Caddo:

Be It Remembered: That the regular civil term of the First Judicial District Court of the State of Louisiana, in and for the Parish of Caddo was regularly convened and held at the Court House in the City of Shreveport, Caddo Parish, Louisiana, on Monday, Sept. 21st, 1942, at ten o'clock A. M.

Their Honors Judges E. P. Mills; John R. Pleasant; J. H. Stephens and Robt. J. O'Neal, presiding.

Victor G. Simmons, Clerk of Court, represented by H. L. Booth; S. O. Williams; Dan W. Collins and E. W. Goetz, Jr., Deputy Clerks.

J. Howell Flournoy, Sheriff, represented by Joe Bradley; John Currie and Julian Carter, Deputy Sheriffs.

The minutes of the Court for Wednesday, July 15th, 1942, and the minutes of the entire summer were read and approved in open Court.

Shreveport, Louisiana,
Tuesday, March 2, 1943.

Court met pursuant to adjournment.

Their Honors, Judges McClendon and O'Neal, presiding.

The minutes of yesterday were read and approved in open Court.

86,893

Succn. of Sam Wiener, Jr.: Regularly taken up for trial on Rule to Show Cause. Answer filed by defendant in rule. Plea of unconstitutionality filed by plaintiff in rule. Agreed statement of facts filed and entire matter submitted.

[fol. 4] Shreveport, Louisiana,
Wednesday, March 10, 1943.

Court met pursuant to adjournment.

Their Honors, Judges McClendon, O'Neal and Mills, presiding.

The minutes of yesterday were read and approved in open Court.

86,893

Succn. of Sam Wiener, Jr.: For reasons orally assigned the plea of unconstitutionality was sustained. Judgment rendered in favor of plaintiff in rule fixing the amount of inheritance tax due the State of Louisiana, in the sum of $8,223.09. Judgment in accordance read, signed and filed.

Shreveport, Louisiana,
Saturday, March 13, 1943.

Court met pursuant to adjournment.

Their Honors, Judges Mills and O'Neal, presiding.

The minutes of yesterday were read and approved in open Court.

86,893

Succn. of Sam Wiener, Jr.: Motion made by J. Howell Flournoy, Tax Collector for orders of suspensive and devolutive appeal to the Supreme Court of Louisiana, only in so far as Movers' demand were rejected; appeal granted as asked for returnable on May 3, 1943, without bond.

[fol. 5] [File endorsement omitted]

IN THE FIRST JUDICIAL DISTRICT COURT OF LOUISIANA, PARISH OF CADDO

Succn. of Sam Wiener, Jr.

PETITION TO PROVE WILL—Filed February 23, 1943

To the Honorable the Judges of the First Judicial District Court of the State of Louisiana, in and for the Parish of Caddo:

The petition of Samuel G. Wiener, William B. Wiener, and Jacques L. Wiener, with respect represents:

1

That Sam Wiener, Jr., departed this life at his domicile in Caddo Parish, Louisiana, on December 10, 1942, as will appear from the affidavits annexed hereto.

2

That the Decedent left an olographic will, dated on the eighth day of April 1940, which your petitioners file herewith.

3

That under the terms of the attached will your petitioners are named as the sole legatees of the Decedent.

4

That Decedent's will does not provide for an executor, and that none is necessary, as the only debts left by the Succession were current debts which has been paid by your petitioners and taxes, the liability for which your petitioners hereby assume.

5

That decedent's parents predeceased him by many years, and the only children of the Decedent are your petitioners and Earl L. Wiener, who consents to the probate, registry and execution of the attached will as appears from the annexed affidavit.

[fol. 6] Wherefore petitioners pray that they be permitted to prove the will of Sam Wiener, Jr., deceased, at a time to be set by this honorable Court, and the said will be admitted to probate, registered and executed, and that your petitioners be recognized as the sole legatees of Sam Wiener, Jr., deceased, and after payment of the inheritance tax due to the State of Louisiana, in an amount to be hereinafter determined that your petitioners be placed in possession of the Succession of Sam Wiener, Jr.

Herold, Cousin and Herold, by S. L. Herold, Jr.,
Jacques L. Wiener, Attorneys for Petitioners.

* * * * * * *

Duly sworn to by Samuel G. Wiener, William B. Wiener and Jacques L. Wiener. Jurat omitted in printing.

[fol. 7] AFFIDAVIT OF EARL L. WIENER CONSENTING TO PROBATE

STATE OF LOUISIANA,
Parish of Caddo:

Before me, the undersigned authority, personally came and appeared Earl L. Wiener, who upon being duly sworn did depose and say that he consents to the probate of the will of Sam Wiener, Jr., and that he makes no claim to any interest in the Succession of Sam Wiener, Jr.

Thus sworn to and subscribed before me, Notary Public, at Shreveport, Louisiana, in the presence of the undersigned competent witnesses, on this the 22nd day of February, 1943.

Earl L. Wiener.

Witness: Adelene Bruce, Hester Rathfon.
J. W. Williams, Notary Public.

AFFIDAVIT OF J. W. WILLIAMS AND HERMAN L. HEROLD

STATE OF LOUISIANA,
Parish of Caddo:

Before me, the undersigned authority personally came and appeared J. W. Williams and Herman L. Herold, who upon being duly sworn did depose and say that they knew Sam Wiener, Jr., for many years, that the said Sam Wiener, Jr., departed this life at his domicile in Shreveport, Louisiana, on December 10, 1942, that the parents of the said Sam Wiener, Jr., had predeceased him, and that the only children of Sam Wiener, Jr. are Earl L. Wiener, Samuel G. Wiener, William B. Wiener and Jacques L. Wiener, all residents of Caddo Parish, Louisiana.

Thus sworn to and subscribed before me, Notary Public, at Shreveport, Louisiana, in the presence of the undersigned competent witnesses, on this the 23d day of February, 1943.

[fol. 8] J. W. Williams, Herman L. Herold.

Witness: Adelene Bruce, Samuel L. Herold.
Hester A. Rathfon, Notary Public.

IN THE FIRST JUDICIAL DISTRICT COURT OF LOUISIANA

ORDER DIRECTING PROOF OF WILL

Let the last will and testament of Sam Wiener, Jr. filed with the above petition be proved before me on the 24 day of February at 11 o'clock A. M. 1943, A. D.

Robt. J. O'Neal, District Judge.

Shreveport, La.

[fol. 9] IN THE FIRST JUDICIAL DISTRICT COURT OF LOUISIANA, PARISH OF CADDO

WILL OF SAM WIENER, JR.

I, Sam Wiener, Jr., being sound of mind and body make this, my last will and testament

I leave, will and bequeath unto my sons Jacques L. Wiener, William B. Wiener and Samuel G. Wiener, all of my property of any nature whatsoever, having heretofore given to my son Earl L. Wiener, property and money equal in value to a full one fourth of my estate—

Thus entirely written, dated and signed by me at Shreveport, Louisiana, on this 8th (eighth) day of April nineteen hundred and forty.

Sam Wiener, Jr.

Shreveport, Louisiana, April 8th, 1940.

Ne Varietur. Feby. 24, 1943. Robt. J. O'Neal, Judge.

[fol. 10] [File endorsement omitted]

IN THE FIRST JUDICIAL DISTRICT COURT OF LOUISIANA, PARISH OF CADDO

ORDER PROVING WILL OF SAM WIENER, JR.—Filed February 24, 1943

Be it known that on this date and pursuant to an order issued by me herein personally came and appeared before me, District Judge, Jeanette Williams and Adelene Bruce, competent witnesses and residents of Caddo Parish, Louisiana, who upon being duly sworn were by me presented with an instrument in writing purporting to be the last will and testament of the late Sam Wiener, Jr., which instrument

consists of one page, is dated the *eighth day of April, 1940,* begins with the following words: "I, Sam Wiener, Jr., being sound of mind and body, make this my last will and testament * * *" and ends as follows: "thus entirely written, dated and signed by me at Shreveport, Louisiana, on this 8th (eighth) day of April, Nineteen Hundred and Forty—Sam Wiener, Jr.".

The said appearers declared to me under oath that they are familiar with the hand-writing and signature of the Sam Wiener, Jr., deceased, and upon being presented with the instrument described above further declared that it is entirely written, dated and signed in the handwriting of Sam Wiener, Jr.

Whereupon I read the will, in an audible and distinct voice to the witnesses above named and the other persons present, namely, William C. Vaught and C. B. Williams and being satisfied that it was the last will and testament of Sam Wiener, Jr., para-phed the said instrument at the beginning and end thereof, and I do hereby declare the said will to be duly proved and order that it be deposited in the office of the Clerk of the First Judicial District Court of [fol. 11] Louisiana, and there recorded, and that the execution thereof take place according to law.

Thus done and signed in chambers, this 24 day of February, 1943, A. D.

Witness: Jeannette Williams, Adelene Bruce, C. B. Williams, Wm. C. Vaught.

Robt. J. O'Neal, District Judge.

[fol. 12] [File endorsement omitted]

IN THE FIRST JUDICIAL DISTRICT COURT OF LOUISIANA, PARISH OF CADDO

PETITION FOR RULE TO APPEAR FOR TAX ASSESSMENT—Filed February 24, 1943

The petition of Samuel G. Wiener, William B. Wiener and Jacques L. Wiener, with respect represents:

1

That the will of Sam Wiener, Jr., deceased, has been duly probated, and that under the terms thereof your petitioners are the sole legatees.

That your petitioners owe an inheritance tax on the interest acquired by them under the terms of the will, and that it is necessary that the amount thereof be fixed contradictorily with the Tax Collector of Caddo Parish.

Wherefore your petitioners pray that a rule issue herein commanding J. Howell Flournoy, Sheriff and Ex Officio Tax Collector of Caddo Parish, Louisiana, to appear herein on a date to be fixed by this Court for the purpose of determining the amount of inheritance tax due to the State of Louisiana, and that after the tax has been duly determined and paid your petitioners be placed in possession of the Succession of Sam Wiener, Jr.

Herold, Cousin and Herold, by Sidney L. Herold, Jacques L. Wiener, Attorneys for Petitioners.

[fol. 13] *Duly sworn to by Jacques L. Wiener. Jurat omitted in printing.*

In the First Judicial District Court of Louisiana, Parish of Caddo

Order to Appear for Tax Assessment—February 24, 1943.

Let J. Howell Flournoy, Sheriff and Ex Officio Tax Collector of Caddo Parish, Louisiana, be, and he hereby is ordered to appear in this cause on the 3rd day of March, 1943 A. D. for the purpose of fixing the inheritance tax due to the State of Louisiana by the above named petitioners.

Shreveport, Louisiana, the 24th day of February, 1943.

Robt. J. O'Neal, District Judge.

Service accepted and citation waived.

Shreveport, Louisiana, the 24th day of February, 1943 A. D.

Harry V. Booth, Attorney for Tax Collector.

[fol. 14] [File endorsement omitted]

IN THE FIRST JUDICIAL DISTRICT COURT OF LOUISIANA, PARISH OF CADDO

ANSWER TO RULE—Filed March 2, 1943

Now into Court comes State of Louisiana, through J. Howell Flournoy, Sheriff and Ex Officio Tax Collector of Caddo Parish, Louisiana, and in answer to the rule filed herein with respect, avers:

1

Paragraph 1 is admitted.

2

In answer to Paragraph 2, your respondent avers that the plaintiffs, the heirs of Sam Wiener, Jr., owe an inheritance tax on the entire community estate rather than upon the one-half interest in the community inherited by them, and in this respect, your respondent further avers:

(a) That by virtue of Act No. 119 of the Legislature of Louisiana for the year 1932, the State of Louisiana is ultimately entitled to recover an inheritance tax against this estate which is equal to eighty per cent of the basic Federal tax as fixed by the Federal Revenue Act of 1926 (Chap. 27, Sec. 301A, 44 Statutes at Large 69, Title 26, Sec. 810, U. S. C. A.); and

(b) That Congress, in the Revenue Act of 1942, (Title IV, Sec. 402 A, 56 Statutes —, Title 26 Sec. 811, U. S. C. A.) provides that the basic Federal Estate Tax is computed upon the entire community and accordingly, the State of Louisiana is entitled to an amount equal to eighty per cent of the basic Federal Estate Tax so calculated.

Wherefore, your respondent prays that upon the determination of the net value of the entire community, that [fol. 15] there be judgment herein in favor of the State of Louisiana, and against petitioners, the heirs of Sam Wiener, Jr., for inheritance tax in a sum equal to eighty per cent

of the tax due the Federal Government under the Basic Federal Estates Tax.

Further prays for all necessary orders, general and equitable relief.

Harry V. Booth, Attorney for the Inheritance Tax Collector.

Duly sworn to by Harry V. Booth. Jurat omitted in printing.

[fol. 16] [File endorsement omitted]

IN THE FIRST JUDICIAL DISTRICT COURT OF LOUISIANA, PARISH CADDO

PLEA OF UNCONSTITUTIONALITY—Filed March 2, 1943

1

In the above entitled and numbered cause, come now the movers Samuel G. Wiener, William B. Wiener and Jacques L. Wiener, and specially plead that, notwithstanding anything to the contrary that may be contained in the Federal Revenue Act of 1942, approved on October 21, 1942, there may not be included in the estate of the decedent, subject to the Federal Estate Tax (and consequently subject to the provisions of the State Inheritance Tax under Act 119 of 1932) any property except that which was owned by the decedent at the instant of his death, and by his death transmitted to his heirs.

2

Insofar as the said Federal Statute may be construed as including in the estate of the decedent, for purposes of such tax, the entirety of the marital partnership of which decedent was a member, and in all the assets of which the decedent and his wife had, at the time of the former's death each a present and equal vested interest, they show that the provision of the Revenue Act of 1942 above referred to, is unconstitutional, null and void, because:

(a) Such provision is in contravention of and violative of Section 8 of Article I of the Constitution of the United States which requires that all duties, imposts and excises shall be uniform throughout the United States, inasmuch

as such statute does not seek to include in the estate of a deceased husband property of which his wife was presently vested prior to his death except in those states, such as [fol. 17] Louisiana, in which the community property system prevails.

(b) Such statutory provision is in contravention of and violative of the Fifth Amendment to the Constitution of the United States, in that its application would deprive these appearers of their property without due process of law by its imposition of taxes upon them, based both upon an arbitrary inclusion in the estate of the decedent of property which did not belong to him and upon the application thereto of graduated rates based upon values arrived at by reference to such other property.

Wherefore, they pray that such provision of said Act of Congress be decreed unconstitutional, null and void to the extent that it may seek to include in the estate of the decedent, Sam Wiener, Jr., property which at and before his death belonged to his wife as an equal partner with him in the marital community existing under the law of the State of Louisiana.

Jacques L. Wiener, Herold, Cousin & Herold, Attorneys for Movers.

I hereby certify that the above and foregoing plea of unconstitutionality is filed in good faith, and not for the purpose of delay.

March 2nd, 1943.

Sidney L. Herold, Of Counsel.

[fol. 18] [File endorsement omitted]

IN THE FIRST JUDICIAL DISTRICT COURT OF LOUISIANA, PARISH OF CADDO

AGREED STATEMENT OF FACTS—Filed March 2, 1943

Sam Wiener, Jr., died in the City of Shreveport on the 10th day of December 1942, leaving a last will and testament under which his entire estate was disposed of to his three children, who are movers in this rule. No legacies were made to collaterals, or strangers.

2

The decedent was married in Shreveport on the 12th day of February, 1907, to Florence Loeb, who survived him. All of the assets standing in the name of Sam Wiener, Jr., at the time of his death were acquired during the existence of the community between him and his surviving widow, and were owned by said community.

3

That net valuation of the entire community, after payment of debts, succession charges and taxes, State and Federal, as returned by the heirs, is *Six Hundred Eight Thousand Two Hundred Seventy Two Dollars and forty-six cents* ($608,272.46). This valuation, after investigation, has been found satisfactory by the State Collector of Inheritance Taxes, and is accepted as the correct and true valuation of the net entire community subject to the reservation contained in paragraph 6 of this agreed statement of facts.

4

Under Act No. 119 of 1932 of the Legislature of Louisiana, the State Inheritance Tax Collector claims that there is due to the State a tax equal to eighty per cent of the [fol. 19] amount of the Basic Federal Estate Tax, as fixed by the Federal Revenue Act of 1926, (44 Statutes at Large 69; Title 26, Sec. 410 U. S. Code). The heirs of the decedent do not contest their legal liability for eighty percent of such tax as may be lawfully due.

They contend that those taxes are to be computed upon the decedent's share in the community property only, to-wit: one-half of the above sum of Six Hundred Eight Thousand, Two Hundred Seventy Two Dollars and forty-six cents ($608,272.46) Dollars, which is Three Hundred Four Thousand, One Hundred Thirty Six Dollars Twenty Three Cents ($304,136.23).

That State Collector of Inheritance Taxes, however, claims that under §402 (b) (2) of the Revenue Act of 1942, the Basic Federal Estate Tax is computed upon the entire community and, consequently, that the State is entitled to an amount equal to eighty percent of the Federal Basic Estate Tax so calculated. The heirs contend that the provisions of the Federal Revenue Law of 1942, which provides for the inclusion in the estate of the decedent of

the entire community, is unconstitutional, and have filed formal pleading to that effect.

If the contention of the State Collector of Inheritance Taxes were sustained, then the amount of inheritance tax due by these movers, as heirs of the decedent, to the State Collector is $14,330.90.

If, on the other hand, the contention of the heirs the present movers, be sustained, then the amount of the inheritance tax due by them to the State is $8,224.09.

5

Inasmuch as there is no controversy between the parties in respect of the facts of the case, the matter is submitted to the District Court for adjudication as to the liability [fol. 20] of the heirs of the said decedent, and final judgment is to be herein rendered in favor of the State and against the said heirs for the amount ascertained by the Court to be due under these facts, and under the pleadings of the respective parties.

6

Inasmuch as the figures respecting valuation and indebtedness will be later checked by agents of the Federal Bureau of Internal Revenue, and inasmuch as said valuations may be later increased, or the deductible indebtedness diminished by the said Bureau, it is stipulated and agreed, anything to the contrary notwithstanding, that when and as final settlement shall have been made by the heirs of the decedent with the Federal Bureau of Internal Revenue, that the State of Louisiana shall have the benefit of such settlement; and that the said State Inheritance Tax Collector, or such official as may then have his present powers, may proceed by supplemental pleadings, or otherwise, for further and additional judgment based upon such increase in valuation and/or deduction and/or denial of deductible indebtedness.

In computing the net value of the estate, there has been deducted a sum representing a tentative computation of the Federal Estate Tax, which the heirs contend is to be deducted before calculating the State Inheritance Tax. The right is specifically reserved to the State Inheritance Tax Collector to contest this matter in subsequent proceedings.

Herold, Cousin & Herold, Jacques L. Wiener, Attorneys for Movers. Harry V. Booth, Attorney for State Inheritance Tax Collector.

[fol. 21] IN THE FIRST JUDICIAL DISTRICT COURT OF LOUISIANA, PARISH OF CADDO

JUDGMENT—Filed March 10, 1943

In this cause, by reason of the law and the evidence being in favor thereof, and for the reasons orally assigned.

It is Ordered, Adjudged and Decreed that the plea of unconstitutionality herein filed by the plaintiffs in rule be and the same is hereby sustained.

Accordingly, It is Further Ordered, Adjudged and Decreed that so much of the Federal Revenue Act of 1942, approved on October 21, 1942, as seeks to subject to the Federal Estate Tax, and consequently makes subject to the provisions of the State Inheritance Tax under Act 119 of 1932, and amendments thereof, the property of which the surviving wife of the decedent had a present and vested interest prior to his death, is violative of Section 8 of Article I of the Federal Constitution for want of uniformity throughout the United States, and is likewise violative of the Fifth Amendment to the Constitution of the United States in that its application here would deprive the heirs of the decedent of their property without due process of law.

It is, therefore, Further Ordered, Adjudged and Decreed that the Inheritance Tax due by the heirs and legatees of the decedent, who are plaintiffs in this rule, may be based only upon the one-half of the community which was owned by the decedent at and prior to his death, and by his last will and testament transmitted to said heirs.

It is accordingly Further Ordered, Adjudged and Decreed that there be judgment in favor of the State Collector of [fol. 22] Inheritance Taxes and against the plaintiff in rule, Samuel G. Wiener, William B. Wiener and Jacques L. Wiener, in the sum of Eighty Two Hundred Twenty Four Dollars and Nine Cents ($8224.09) as inheritance taxes due to the State of Louisiana; and that upon the payment of the said sum to the Sheriff of Caddo Parish and Ex-Officio Collector of State Inheritance Taxes, the said Samuel G. Wiener, William B. Wiener and Jacques L. Wiener be, as the universal legatees of Sam Wiener, Jr., deceased, sent into unconditional possession of his Succession.

It is Further Ordered, Adjudged and Decreed that there be reserved to the State Collector of Inheritance Taxes by

further and supplemental proceedings to avail himself of the reservation contained in the sixth paragraph of the agreed statement of facts herein filed.

Thus Done, Read and Signed in open Court on this the 10th day of March, 1943.

Robt. J. O'Neal, Judge, First Judicial District Court, Caddo Parish, Louisiana.

[fols. 23-24] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 25] IN THE SUPREME COURT OF LOUISIANA

Number 37089

Succession of Sam Wiener, Jr.

Appeal from the First Judicial District Court, Parish of Caddo, Honorable Robert J. O'Neal, Judge.

JOINT MOTION TO ADVANCE

In the above styled and numbered cause come now J. Howell Flournoy, Sheriff and Ex-Officio Collector of Inheritance Taxes for the State of Louisiana, the appellant, and also came and appeared Samuel G. Wiener, William B. Wiener and Jacques L. Weiner, the appellees, all represented by their respective counsel of record, and show:

1

That this appeal is from a judgment rendered upon a rule for the fixing of the amount of inheritance taxes due the State of Louisiana; that the issue on the trial of the said [fol. 26] rule is whether, under the provisions of Act 119 of 1932, the State Inheritance tax shall be based upon the entirety of the community existing, equally and jointly, between the decedent and his surviving spouse, or only upon the half of the community which was owned by the decedent, and which alone passed to the appellees by his death and by his last will and testament.

As appears from the transcript in this cause, this issue, in turn, depends upon the constitutionality of the Federal Revenue Act of 1942; and that the District Court sustained the contention of the appellees that so much of the said

Federal Revenue Act as seeks to include in the taxable estate of the decedent the entirely of the property owned prior to his death equally and jointly by him and his wife as partners in community, is unconstitutional and, therefore, that under the said Act of 1932, the State Inheritance tax is measured only by the property actually owned by the decedent.

Your appearers, therefore, show that this cause presents a case for special preference for these reasons:

(a) That it is a proceeding for putting heirs into possession of an estate;

(b) That it is a suit involving the constitutionality of a tax;

(c) That it is a suit wherein the collection of a tax is delayed, and the public interest and public fisc involved.

[fol. 27] 2

That under Section 2 of Rule IX of the rules of this Honorable Court, this case is, therefore, entitled to be assigned for argument by special preference in preference to cases previously docketed.

Wherefore, both appellant and appellees jointly move and pray this Honorable Court for an order directing that this case be fixed summarily, and by special preference, on the earliest available date, and be granted preference over cases already assigned for argument on such date.

(Signed) Harry V. Booth, Attorney for the Tax Collector, Appellant. (Signed) Harold, Cousin & Herold, Attorneys for Plaintiffs in rule, Appellees.

Duly sworn to by Harry V. Booth and Sidney L. Herold. Jurat omitted in printing.

[fol. 28] IN SUPREME COURT OF LOUISIANA

ORDER SETTING CASE—March 20, 1943

Considering the foregoing joint motion,

It is now ordered that this cause be assigned for argument, summarily and by special preference, for Monday, the 17th day of May 1943, and that it be placed by the Clerk

upon the argument docket for said date in preference of cases previously assigned for such date.

Thus done and signed officially, at New Orleans, on this 20th day of March, 1943.

(Signed) Charles A. O'Niell Chief Justice.

[fol. 29] IN THE SUPREME COURT OF LOUISIANA

[Title omitted]

JOINT MOTION TO NOTIFY ATTORNEY GENERAL OF THE UNITED STATES AND ORDER THEREON—March 20, 1943

In the above styled and numbered cause, come now Harry V. Booth, counsel of record for the Tax Collector, the appellant herein, and also came Jacques L. Wiener and Sidney L. Herold, counsel of record for the plaintiffs in rule, the universal legatees of Sam Wiener, Jr., deceased, and jointly represent:

1

That the issues in this cause depend upon the constitutionality of a provision of a Federal statute, to-wit, the Federal Revenue Act of 1942, approved October 21, 1942.

2

That, while the United States is not a party to this proceeding, and while there is no statute so directing, yet counsel respectfully suggest to this Honorable Court the pro-
[fol. 30] priety of an order herein, directing the Clerk of this Court to notify the Attorney General of the United States that this case is pending, and that it has been assigned for argument for a particular date, and that this Court would entertain appearance by the Attorney General of the United States, or other counsel designated by him, as *amicus curiae*, should he see fit so to appear.

Wherefore, they respectfully move and pray the Court for such order.

(Signed) Harry V. Booth Attorney for the Tax Collector. (Signed) Jacques L. Wiener. (Signed) Herold, Cousin & Herold, Attorneys for Plaintiffs in rule.

ORDER

On joint motion of Harry V. Booth, counsel of record for the Inheritance Tax Collector, Appellant, and of Jacques L. Wiener and Sidney L. Herold, counsel of record for the universal legatees of Sam Wiener, Jr. deceased, It Is Now Ordered:

That the Clerk of this Court do notify by letter the Attorney General of the United States that there is pending in [fol. 31] this Court this cause, Number 37089 of its docket, in which is involved the constitutionality of a portion of an Act of the Congress of the United States, and that the said Attorney General is invited, if he see fit, to appear herein as *amicus curiae*, either personally or through such counsel as he may designate at the hearing of this cause, now set by preference for the 17th day of May, 1943.

By the Court, New Orleans, Louisiana, March 20, 1943.

(Signed) Charles A. O'Niell Chief Justice.

[fol. 32] IN THE SUPREME COURT OF LOUISIANA

[Title omitted]

AMENDED PLEA OF UNCONSTITUTIONALITY

To the Honorable, the Supreme Court of Louisiana:

In the above styled and numbered cause now come the appellees, plaintiffs below on the rule directed to the State Inheritance Tax Collector of Caddo Parish, Louisiana, and respectfully show:

1

That as specially pleaded, and as held by the District Court, the issue in this cause is the constitutionality of Section 402 (b)(2) of the Federal Revenue Act of 1942, approved October 21, 1942. That Statute, insofar as it seeks to impose estate taxes in the case of the death of a partner in community measured by and based upon the entire community instead of upon the interest only of the deceased, is violative of the Fifth Amendment to the Fed- [fol. 33] eral Constitution, and likewise of the uniformity clause of Section 8 of Article I of the Constitution of the United States.

2

By brief and by oral argument, the Attorney General of the United has injected into this cause for the first time the contention that

> "the tax liability here in issue is only that imposed by the State Statute",

and, accordingly, he argues that the issue here is the constitutionality of State, and not Federal, action.

Without in any manner conceding the correctness of that position, but on the contrary expressly reaffirming that this cause involves and depends upon the constitutionality of the Federal Statute, these appellees now plead in the alternative that if it is the State Statute, or State action whose constitutionality must be determined, then that in the construction of the State Statute, either alone or in conjunction with the Federal Statute, or any action by the State taxing authorities, or any other State authorities, which would impose an inheritance tax upon the death of Sam Wiener, Jr., the father of these appellees, based or measured upon the value of the entire community existing betwen the said Sam Wiener, Jr. and his surviving widow, Florence Loeb Wiener, would be in violation of the Fourteenth Amendment to the Constitution of the United States.

[fol. 34] Wherefore, they reiterate their prayer for an affirmance of the decree appealed from.

(Signed) Jacques L. Wiener, Herold, Cousin & Herold, Attorneys for Appellees.

I certify that the foregoing plea is filed in good faith, and not for the purpose of delay.

Shreveport, Louisiana, May 21st, 1943.

(Signed) Sidney L. Herold, Of Counsel for Appellees.

Service of the above and foregoing alternative plea of unconstitutionality is acknowledged; and considering the fact that the same is filed in reply to argument advanced by the Attorney General of the United States for the first time on the argument of this cause, there is of course no objection on our part to its consideration and disposition by the Honorable the Supreme Court of Louisiana.

(Signed) Harry V. Booth, L. L. Lockard, Attorneys for the Tax Collector of Caddo Parish, Louisiana.

[fol. 35] IN THE SUPREME COURT OF LOUISIANA

Succession of SAM WIENER, JR.

Appeal from the First Judicial District Court for the Parish of Caddo; Hon. Robert J. O'Neal, Judge

Rogers, J., Absent

OPINION—June 21, 1943

FOURNET, Justice:

Samuel G., William B., and Jacques L. Wiener, the universal legatees and heirs of the late Sam Wiener, Jr., proceeding under Act No. 127 of the Extra Session of 1921, as amended by Act No. 44 of 1922, ruled the sheriff and ex-officio tax collector for the parish of Caddo to fix the amount of inheritance tax due the state of Louisiana on the property bequeathed to them by their father under the terms of his will, being the undivided half interest in the property acquired during the community of acquets and gains that existed between him and their mother, who survives the decedent and owns the other undivided half of the estate.

Answering this rule, the tax collector averred the heirs owed "an inheritance tax on the *entire* community estate rather than upon the one-half interest in the community in-[fol. 36] herited by them," for in Section 402(b) (2) of the Revenue Act of 1942, (26 U. S. C. A. 811 e-2) Congress has included the entire community in which a decedent had an interest at the time of his death in his taxable estate and the Louisiana Legislature, in Section 2 of Act No. 119 of 1932, provided that the estate tax to be levied in this state shall be at least 80% of the estate tax payable to the United States. (Italics ours.)

The plaintiffs in the rule then interposed a plea challenging the constitutionality of this act of Congress, as being in contravention of Section 8 of Article I of the Constitution of the United States and of the 5th amendment thereto.

The district judge, after the case was tried on an agreed statement of facts, sustained the plea of unconstitutionality on both counts, decreeing the inheritance tax due the state of Louisiana by the plaintiffs in the rule to be $8,224.09, based on the property bequeathed them by their father, that is, on his half of the community property.

The tax collector appealed from this judgment, and the United States, filing a brief Amicus Curias through the office of its Attorney General joined the appellant in upholding the constitutionality of Section 402(b) (2) of the Revenue Act of 1942, in the event this court concludes, contrary to the government's contention, the constitutionality thereof must be passed on.

There is no controversy between the parties with respect to the facts of the case. Sam Wiener, Jr., died in the city of Shreveport, Louisiana, on December 10, 1942, leaving a last [fol. 37] will and testament under which his entire estate was bequeathed to his three children, the plaintiffs in this rule. All of the property and assets standing in the name of the decedent at the time of his death were acquired by and belonged to the community that had existed between him and his surviving widow, Florence Loeb, to whom he was married on February 12, 1907, the appraised value of which, after deduction and payment of debts, succession charges, and taxes is $608,272.46. It is agreed between the plaintiffs in the rule and the respondent tax collector that if the tax is to be computed on the property received by the heirs as the legatees of their father; that is, on $304,136.23, his half of the community property, the amount of the inheritance tax due the state is $8,224.09, but that if it is to be computed on the entire community, as the tax collector contends, the inheritance tax due by them is $14,330.90.

In the year 1932, the Louisiana legislature, to obtain the benefit of the provisions contained in Section 301 (b) of the Revenue Act of 1926 making it mandatory that a credit of 80% be allowed against the inheritance tax due the federal government for inheritance estate, and succession taxes paid the states with respect to property included in the gross estate, adopted its Act No. 119 providing: "Whenever the aggregate amount of all inheritance, succession, legacy and estate taxes actually paid to the several states of the United States in respect to any property owned by such decedent shall be less than eighty per cent (80%) of the estate tax payable to the United States under the provisions of the said Federal Revenue Act of 1926, but not otherwise, the difference between said amount and said eighty per cent (80%) shall be paid to the State of Louisiana."

[fol. 38] Under the express provisions of Act No. 127 of the Extra Session of 1921, as amended by Act No. 44 of 1922, the heirs or legatees of a deceased person are required

to have the inheritance tax fixed within six months after the death of the party in whose estate they are benefiting, a fee equivalent to 1% per month being charged if such payment is made after the six months period, increased to 2% per month after 12 months.. They cannot be placed in possession of the property so inherited until such tax has been paid.

Now, because of the Congressional adoption of Section 402(b) (2) of the Revenue Act, amending Section 811(e) of the Revenue Code of 1939 (26 U. S. C. A. 811(e), the tax collector of Caddo parish is contending inheritance and estate taxes in this state, under Act No. 119 of 1932, must be computed on the basis established in that section, that is, that the value of the gross estate of the decedent to be taxes must be determined by including therein "the value at the time of his death of all property", such gross estate where community interests are involved consisting of "The extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State * * * except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition." Section 402(b) (2) of the Revenue Act of 1942; 26 U. S. C. A. 811(e) (2).

Under the express provisions of the Louisiana Revised Civil Code, "Every marriage contracted in this State, [fol. 39] superinduces of right partnership or community of acquets or gains" (Article 2399), and "*This partnership* or community *consists* of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, *of the product of the reciprocal industry and labor of both husband and wife, and of the estate which they may acquire during the marriage*, either by donations made jointly to them both, or by purchase, or in any other similar way, *even although the purchase be only in the name of one of the two and not of both, because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase.*" *Article 2402.* (Italics ours.)

That this community is a partnership in which the husband and wife own equal shares, their title thereto vesting at the very instant such property is acquired, is well settled in this state (Dixon v. Dixon's Executors, 4 La. 188; Theall v. Theall, 7 La. 226; Succession of Marshal, 118 La. 212, 42 So. 778; Succession of May, 120 La. 692, 45 So. 551; Beck v. Natalie Oil Co., 143 La. 154, 78 So. 430; Ramsey v. Beck, 151 La. 190, 91 So. 674, Phillips v. Phillips, 160 La. 813, 107 So. 584; Pfaff v. Bender, 38 F. (2d) 642; and Bender v. Pfaff, 282 U. S. 127, 75 L. Ed. 252) and the federal government, in levying inheritance or estate taxes, has consistently recognized that the law of the state is determinative of the interest left by the decedent. Liebman v. Fontenot, 275 Fe. 688; Warburton v. White, 176 U. S. 484, 44 L. Ed. 555; Arnett v. Reade, 220 U. S. 311, 55 L. Ed. 477; and 32 Opinions Attorney General 435.

It is our opinion, therefore, that the construction sought to be placed on Act No. 119 of 1932 by the tax collector—that is, that in arriving at the amount of inheritance taxes [fol. 40] due by the plaintiffs in this rule on the property bequeathed to them by their father, there must be included in his gross estate not only the half interest in the community owned by him and willed to them, but also the half of the community belonging to their mother, who survives—would render it violative of the due process guaranteed by the 14th amendment to the Constitution of the United States, since such interpretation would result in the imposition of a tax upon those succeeding to the estate of a decedent measured in part by the property comprising the estate of another, to which the estate of the decedent is in no way related.

In the case of Hoeper v. Tax Commission, 284 U. S. 206, 76 La. Ed. 248, the Supreme Court of the United States, in reversing a decision of the highest court in Wisconsin maintaining the validity of a statute of that state requiring the husband and wife to file joint income tax returns and levying a tax on a graduated scale on the combined total of the two incomes, pointed out that the question presented was whether a state has the power to measure the income tax owed by the husband on an income that was, in part, that of his wife, and concluded that "*because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another*

is contrary to due process of law as guaranteed by the 14th Amendment. That which is not in fact the taxapayer's income cannot be made such by calling it income." See, also, Knowlton v. Moore, 178 U. S. 41, 44 L. Ed. 969, 20 S. Ct. 747. (Italics ours.)

The limitation placed upon the states by the 14th amendment is likewise placed on the federal government under the 5th amendment.

In the case of Nichols v. Coolidge, 274 U. S. 531, 71 L. Ed. 1184, 52 A. L. R. 1081, 47 S. Ct. 710, the Supreme Court of the United States expressly recognized that the congres- [fol. 41] sional power to levy an inheritance tax is subject to the restrictions and limitation found in the 5th amendment, holding that so much of Section 402(c) of the Revenue Act of 1919 requiring the value of property donated by a decedent prior to the passage of such act should be included in computing the gross estate on which the inheritance or estate tax was to be levied, amounted to a taking of property without due process of law, in violation of the 5th amendment, saying:

"This court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the 5th amendment. Brushaber v. Union P. R. Co. 240 U. S. 1, 60 L. Ed. 493, L. R. A. 1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B 713; Barclay & Co. v. Edwards, 267 U. S. 442, 69 L. Ed. 703, 45 Sup. Ct. Rep. 348. See also Knowlton v. Moore, 178 U. S. 41, 44 L. Ed. 969, 20 Sup. Ct. Rep. 747. And we must conclude that Section 402(c) of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation."

This section of the Revenue Act of 1919 (402-c) was amended in 1926 (302-c) to provide that transfers of property made within two years prior to the death of a person should be calculated in computing his estate for the purpose of levying an inheritance tax thereon, as having been made in contemplation of death, and the Supreme Court, again passing on the constitutionality of the statute, answering affirmatively the question certified to it by the Circuit Court

of Appeals for the Third Circuit of whether or not the sen-
[fol. 42] tence in this section reading: "Where within two years prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title," constituted a violation of the due process clause of the 5th Amendment to the Constitution of the United States, had this to say:

"In substance and effect, the situation presented in the Hoeper Case is the same as that presented here. In the first place, *the tax, in part, is laid in respect of property shown not to have been transferred in contemplation of death and the complete title to which had passed to the donee during the lifetime of the donors;* and secondly, the tax is not laid upon the transfer of the gift or in respect to its value. It is laid upon the transfer, and calculated upon the value, of the estate of the decedent, such value being enhanced by the fictitious inclusion of the gift, and the estate made liable for a tax computed upon that value. * * * *The result is that upon those who succeed to the decedent's estate there is imposed the burden of a tax, measured in part by property which comprises no portion of the estate, to which the estate is in no way related, and from which the state derives no benefit of any description.* Plainly, this is to measure the tax on A's property by imputing to it in part the value of the property of B, a result which both the Schlesinger and Hoeper cases condemn as
[fol. 43] arbitrary and a denial of due process of law. *Such an exaction is not taxation but spoilation.* 'It is not taxation that government should take from one the profits and gains of another. That is taxation which compels one to pay for the support of the government from his own gains and of his own property.' United States v. Baltimore & O. R. Co. 17 Wall. 322, 326, 21 L. Ed. 597, 599." Hiener v. Donnan, 285 U. S. 312, 76 L. Ed. 772. (Italics ours.)

It is obvious, therefore, that the interpretation sought here with respect to Section 402(b) (2) of the Revenue Act of 1942, is to the same effect as that sought with reference to Act No. 119 of 1932, that is, the inclusion in the taxable estate of the decedent Wiener his wife's property, in violation of the 5th Amendment to the Constitution of the United States.

The conclusion we have reached in this case is in keeping with the decision of the United States Supreme Court in the case of Bender v. Pfaff, supra, where that court recognized that under the law of Louisiana the wife is not only vested with the ownership of half of the community property from the moment it is acquired, but is likewise the owner of half of the community income. It necessarily follows that the wife's share of this income was utilized in acquiring the property found in the community estate that existed between her and her deceased husband.

In fact, counsel for the tax collector concede in their brief that if the Pfaff case "stood alone in the jurisprudence, undoubtedly the position of the succession here would be correct, but there are other cases pointing to a contrary result in so far as the Federal Estate law is [fol. 44] concerned," citing the cases of Tyler v. United States, 281 U. S. 497, 74 L. Ed. 991, and United States v. Jacobs, 306 U. S. 363, 83 L. Ed. 763.

A study and analysis of these two cases, in our opinion, conclusively demonstrates that they are neither controlling of the issue presented in this case, nor apposite.

In the Tyler case, the Commissioner of Internal Revenue included in Tyler's gross estate certain property held by him and his wife under a tenancy by the entirety in Maryland and Pennsylvania, that is, (1) corporate shares that, at the time of the conveyance creating the tenancy by the entirety with respect thereto, were owned solely by the decedent; (2) ground rent and real estate purchased with the separate funds of the husband though conveyed to both of them as tenants by the entirety; and (3) real estate owned by the decedent at the time it was conveyed to a third person and reconveyed to the decedent and his wife as tenants by the entirety. The question was whether or not the inclusion of this property in the gross estate of the decedent for the purpose of computing the tax upon the transfer of the net estate under Section 202 (c) of the Revenue Acts of 1916 and 1921 contravened the 5th Amend-

ment to the Constitution of the United States. The court found that none of the property constituting the tenancy thus created had, prior thereto, ever belonged to the surviving spouse, and that although, under the law of Maryland and Pennsylvania, no interest in the property held by tenants by the entirety passed to the surviving spouse upon the death of one of them, the whole continuing in the survivor, such law was based upon the amiable fiction of the common law that the husband and wife are but one person—constitute one unit—and that the wife, while entitled to the joint use and possession of the property during the lifetime of [fol. 45] her husband, was without right to dispose of any part thereof by will or pass it to her legal heirs, concluding that: "*These circumstances, together with the fact, the existence of which the statute requires, that no part of the property originally had belonged to the wife, are sufficient, in our opinion, to make valid the inclusion of the property in the gross estate which forms the primary base for the measurement of the tax,*" and pointing out that "The evident and legitimate aim of Congress was to prevent an avoidance, in whole or in part, of the estate tax by this method of disposition during the lifetime of the spouse who owned the property, or whose separate funds had been used to procure it; and the provision under review is an adjunct of the general scheme of taxation of which it is a part, entirely appropriate as a means to that end." (Italics ours.)

In the Jacobs case, which arose in Illinois, the payment of an estate tax was sought to be evaded by the creation of a joint tenancy, a fiction similar to that of the tenancy by the entirety in the Tyler case, and the question was whether or not "the entire value or only one-half of the value of real property—purchased by a decedent with his own funds and held at his death by his wife and himself under a joint tenancy set up prior to 1916—may be included in the gross estate under the 1924 Revenue Act." There the court, relying on the decision in the Tyler case, concluded that "A tenancy by the entirety 'is essentially a *joint tenancy*, modified by the common law theory that husband and wife are one person,'" and that, as in a tenancy by the entirety, the wife could not dispose of her interest therein by will or pass it to her legal heirs at her death. The court specifically pointed out that the decedent paid the entire purchase price for the property held in the

joint tenancy with his separate funds and that it was clearly [fol. 46] the intention of Congress "to include in the gross estate of a decedent the full value at death of all property owned by him and any other in joint tenancy or by the entirety * * * in so far as the property or consideration therefor is traceable to the decedent." (Italics ours.)

Thus it may be seen that the pivotal points upon which the decisions in these two cases turned were that the wife contributed nothing, either in money or property, toward the creation of the joint tenancy or tenancy by the entirety, and that she was powerless to dispose of any interest in such estate by will or through legal heirship.

In Louisiana, the situation is entirely different, for here the civil law prevails, and the theory of the civil law is that the acquisition of all property during the marriage is due to the joint or common efforts, labor, industry, economy, and sacrifices of the husband and wife; in her station the wife is just as much an agency in acquiring this property as is her husband. In Louisiana, therefore, the wife's rights in and to the community property do not rest upon the mere gratuity of her husband; they are just as great as his and are entitled to equal dignity. Unlike the wife's interest in the common law states where joint tenancies and tenancies by the entirety abide, the wife's interest in the community property in Louisiana is more than a mere expectancy or hope and her husband's death is not the force that generates her title thereto and her rights therein. Over a hundred years ago, in the case of Dixon v. Dixon's Executors, 4 La. 188, this court held that the rights of the wife, as well as those of the husband, in and to the marital gains, grow out of the marriage contract itself and do not originate only when it is dissolved, [fol. 47] and this is now our settled law, as was pointed out in the case of Phillips v. Phillips, 160 La. 813, 107 So. 584. She is the half-partner and owner of all acquisitions made during the existence of the community, *whether they be property or income*. She has the same privilege as her husband of disposing of her interest therein by will, and, in the absence of a will, at her death her interest in the community property passes to her legal heirs in the same manner as her husband's interest therein passes to his legal heirs in the absence of a will.

It is true that in weaving this harmonious commercial partnership around the intimate and sacred marital rela-

tionship, the framers of our law and its codifiers saw fit, in their wisdom, to place the husband at the head of the partnership, but this did not in any way affect the status of the property or the wife's ownership of her half thereof. As expressed in Poe v. Seaborn, 282 U. S. 101, 76 L. Ed. 239, "The law's investiture of the husband with broad powers by no means negatives the wife's present interest as a co-owner." The community partnership had to be placed in charge of a managing partner for very expedicious and necessary reasons,—dealings with third parties with respect to the community property had to be protected from the nullifying actions of the other spouse; the confusion ensuing from dual control had to be avoided. And the husband was made the managing partner of the community and charged with the administration of its effects, as well as with the alienation of its effects and revenues by onerous title, because he was deemed the best qualified to act.

But the redactors of our law did not neglect to hedge the wife's interest in the community property with protecting rights. They subjected the husband's powers to vari- [fol. 48] ous substantial checks and limitations corresponding to those imposed upon any managing partner or agent and provided for the wife a right to assert such limitations. He is, by statute, expressly prohibited from donating the community real estate or the whole or a portion of the movables, and he may not dispose of the community income in any manner by fraud to injure the wife. No portion of the community income can be used to improve his separate estate or to pay his separate debts. The wife may, without obtaining a divorce, and even in the absence of fraud, sue for a dissolution and liquidation of the community partnership and secure the delivery into her own exclusive management and control of her half of the community property whenever her husband proves to be incompetent, a bad manager, of a reckless or speculative disposition, or whenever his affairs are in such disorder that her property rights are jeopardized. Upon the institution of such a suit, she may, by injunction, restrain her husband from disposing of any portion of the community property and she may likewise enjoin his disposition of any part of the community partnership property when, even though he is a good business manager, she provokes a dissolution and liquidation of the community

through divorce proceedings because he is otherwise an unfaithful partner. In the event of a divorce, the wife is entitled absolutely and of right to an exact one-half of the community property and the court has no discretion or power to award her less. This is true even though the husband himself provokes the divorce because the wife has been guilty of the very serious misconduct of adultery. The wife's right to dispose of her interest in the community property by will is absolutely unrestricted; and even though she wills it to her paramour, her husband has no right to [fol. 49] complain. If the wife does not make a will, her children take her share of the community property to the exclusion of the husband; and this is so even though the children are the wife's illegitimate children by another man. In the event the wife dies leaving neither a father nor mother nor decedents, the husband, under the express provisions of Article 915 of the Revised Civil Code, inherits her share of the community property, provided there is not will, and in such case the state of Louisiana, as well as the United States, assesses an estate tax on the property so inherited. The same is true when the wife wills her half of the community to her husband.

It is obvious, therefore, that the wife's interest in the community property in Louisiana does not spring from any fiction of the law or from any gift or act of generosity on the part of her husband but, instead, from an express legal contract of partnership entered into at the time of the marriage. There is no substantial difference between her interest therein and the interest of an ordinary member of a limited or ordinary partnership, the control and management of whose affairs has, by agreement, been entrusted to a managing partner. The only real difference is that the limitations placed on the managing partner in the community partnership are fixed by law, while those placed on the managing partner in an ordinary or limited partnership are fixed by convention or contract. And yet, we are asked to place an interpretation on Act No. 119 of 1926 and Section 402(b)(2) of the Revenue Act of 1942 that would result in the inclusion in the estate of the managing partner of an interest in the community partnership to which he never had any claim and which was, in fact, during his lifetime and is now, owned by his wife.

[fol. 50] It is our conclusion, therefore, that the trial judge, in fixing the estate taxes due by the plaintiffs in

the rule on the property willed to them by their late father, Sam Wiener, Jr., properly excluded from the mass of the estate their mother's half of the community property.

For the reasons assigned, the judgment of the lower court is affirmed.

[fol. 51] IN SUPREME COURT OF LOUISIANA

[Title omitted]

MOTION FOR REHEARING

Now into Court, through undersigned counsel, comes J. Howell Flournoy, Sheriff and Ex-Officio Inheritance Tax Collector for the State of Louisiana, and with respect, shows:

1

That the judgment of this Honorable Court declaring the Act unconstitutional is erroneous, and that a rehearing should be granted herein.

Wherefore, your mover prays that a rehearing be granted herein, and after due proceedings had, that there be judgment herein as prayed for by him.

Further prays for all necessary orders, general and equitable relief.

(Signed) Harry V. Booth, Attorney for Tax Collector.

I hereby certify that the foregoing motion is filed in good faith and not for purposes of delay and that a copy hereof has been forwarded to opposing counsel, this the 28 day of June, 1943.

(Signed) Harry V. Booth, Attorney for Tax Collector.

[fol. 52] IN THE SUPREME COURT OF LOUISIANA

ORDER DENYING MOTION FOR REHEARING—July 13, 1943

Court was duly opened, pursuant to adjournment. Present, Their Honors: Charles A. O'Niell, Chief Justice, and Wynne G. Rogers, Fred M. Odom, Archibald T. Hig-

gins, John B. Fournet, Amos Lee Ponder and Joe B. Hamiter, Associate Justices.

* * * * * * *

Rehearings were refused in the following cases:

* * * * * * *

37,089. Succession of Wiener.

Clerk's Certificate to foregoing order omitted in printing.

[fol. 53] IN SUPREME COURT OF LOUISIANA

[Title omitted]

PETITION FOR APPEAL

Now comes J. Howell Flournoy, Sheriff and Ex-Officio Tax Collector, Caddo Parish, Louisiana, plaintiff and appellant herein and shows:

1

That he considers himself aggrieved by the final decision of the Supreme Court of Louisiana in the above numbered and entitled cause and desires and is entitled to an appeal to the Supreme Court of the United States.

2

That he annexes hereto his Assignment of Errors and files simultaneously his separate typewritten statement as to jurisdiction.

Wherefore, petitioner prays that he be allowed an appeal in this cause from the final judgment herein to the Supreme Court of the United States;

Further prays for all necessary orders, general and equitable relief.

Booth & Lockard, (Signed) by Harry V. Booth.

Duly sworn to by Harry V. Booth. Jurat omitted in printing.

[fol. 54] IN THE SUPREME COURT OF LOUISIANA

[Title omitted]

ASSIGNMENT OF ERRORS

Now comes the appellant J. Howell Flournoy, Sheriff and Ex-Officio Tax Collector for Caddo Parish, and files herewith his petition for an appeal; and in connection therewith the appellant says there are errors in the record and proceedings of the above entitled cause; and for the purpose of having the same reviewed in the Supreme Court of the United States, he files the following assignment of errors:

1

The Supreme Court of Louisiana erred in holding that Section 402 (b)(2) of the Federal Revenue Act of 1942 is unconstitutional as violative of the Fifth Amendment to the Constitution of the United States.

2

The Supreme Court of Louisiana erred in denying legal efficacy to the provisions of Section 402 (b)(2) of the Fed-
[fol. 55] eral Revenue Act of 1942 as requiring the valuation of all of the community property standing in the name of the decedent, Sam Wiener, Jr. in the computation of the Federal basic estate tax; and, consequently, in the computation of the inheritance tax due to the State of Louisiana which, under the statute of the state, is required to be eighty percent of the amount of the Federal basic estate tax.

3

The Supreme Court of Louisiana erred in affirming the judgment of the First Judicial District Court of Louisiana which had held that provisions of Section 402 (b)(2) of the Federal Revenue Act of 1942 are unconstitutional as violative, both of the Fifth Amendment and of Section 8, of Article 1 of the Constitution of the United States.

Wherefore this appellant prays that the aforesaid judgment of the Supreme Court of Louisiana be reversed.

(Signed) Booth & Lockard, Eugene Stanley, Attorneys for Appellant.

[fol. 56] IN THE SUPREME COURT OF LOUISIANA

[Title omitted]

ORDER ALLOWING APPEAL—July 17, 1943

On this the 17th day of July, 1943, on reading the petition of J. Howell Flournoy, Sheriff and Ex-Officio Tax Collector for Caddo Parish, the appellant herein, praying for the issuance of an order herein allowing his appeal to the Supreme Court of the United States from the Supreme Court of the State of Louisiana, and it appearing from said petition and the record in the above entitled cause that there was drawn in question the validity of Section 402 (b)(2) of the Federal Revenue Act of 1942, approved October 21, 1942, on the ground that said statute deprives the appellees of their property without due process of law in violation of the Fifth Amendment to the Constitution of the United States, and that the decision of this Court was against the validity of said statute and that, consequently, such petition is the proper petition for the issuance of this order.

Now, Therefore, It Is Ordered by the undersigned, the Chief Justice of the Supreme Court of the State of Louisiana, that said appeal be and the same is hereby allowed;

It Is Further Ordered that said appeal be allowed upon [fol. 57] bond being furnished as security for costs in the sum of $250.00; and,

It Is Further Ordered that the Clerk of this Court, within forty days from this date, make and transfer to the Clerk of the United States Supreme Court under his hand and the seal of this Court a transcript of the record herein containing a full, true and complete transcript of the record herein.

Thus Done and Signed at New Orleans, Louisiana, on this the 17th day of July, 1943.

(Signed) Charles A. O'Niell, Chief Justice of the Supreme Court of the State of Louisiana.

[fols. 58-82] Citation in usual form showing service on Sidney L. Herold, omitted in printing.

[fols. 83-86] Bond on Appeal for $250.00 Approved July 19, 1943, omitted in printing.

[fol. 87] IN THE SUPREME COURT OF LOUISIANA

[Title omitted]

PRAECIPE FOR RECORD

The Clerk of the Supreme Court of Louisiana will please include in the transcript of appeal to the Supreme Court of the United States the entire record on file with him, together with the following:

(1) Petition for appeal filed by the appellant;
(2) Assignment of errors;
(3) Order allowing appeal;
(4) Appeal bond and approval;
(5) Citation of appeal and acknowledgment of service;
(6) Order of filing of jurisdictional statement and proof of service; and,
(7) This praecipe.

(Signed) Eugene Stanley, Booth & Lockard, Attorneys for Appellant.

Service of the above and foregoing praecipe acknowledged and no counter praecipe to be filed.
July 19, 1943.
(Signed): Herold, Cousin & Herold, Attorneys for Appellees.

[fol. 88] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 89] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS AND DESIGNATION OF RECORD—Filed August 19, 1943

To the Honorable, the Supreme Court of the United States:

Conformably to § 9 of Rule 13, the Appellant herewith files with the Clerk his statement of the points on which he intends to rely, and designation of the portions of the record he thinks necessary for the consideration thereof, to-wit:

1. Appellant states that the only issue before the Court.
[fol. 90] and the point on which he intends to rely is that the

Act of Congress held by the Supreme Court of Louisiana to be unconstitutional, to-wit,

> Section 402 (b) (2) of the Revenue Act of 1942, approved October 21, 1942,

is constitutional, and that the Supreme Court of Louisiana erred in holding said statute to be violative of the Fifth Amendment to the Federal Constitution.

2. In the opinion of Appellant, it is necessary for the consideration of the above named point that the entire record be considered; and he, therefore, designates the entire typewritten record, as transmitted to this Court from the Supreme Court of Louisiana.

Eugene Stanley, Attorney General of the State of Louisiana. Booth & Lockard, Attorneys for Appellant.

I hereby acknowledge service on this the 16th day of August, 1943, of the above statement of points on which Appellant intends to rely, and his designation of the portions of the record which he thinks necessary for the consideration thereof.

Counsel for Appellees also considers the entire typewritten record necessary for the consideration of the constitutional issue involved on appeal.

Sidney L. Herold, Attorney for Appellees.

[fol. 91] SUPREME COURT OF THE UNITED STATES

ORDER POSTPONING FURTHER CONSIDERATION OF THE QUESTION OF JURISDICTION.—October 11, 1943

The statement of jurisdiction is in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court is postponed to the hearing on the merits.

Endorsed on cover: Enter Eugene Stanley. File No. 47,745. Louisiana, Supreme Court. Term No. 252. J. Howell Flournoy, Sheriff and Ex-Officio Tax Collector, Appellant, vs. Samuel G. Wiener, William B. Wiener and Jacques L. Wiener. Filed August 9, 1943. Term No. 252, O. T., 1943.

FILE COPY

FILED
AUG 9 1943
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 252

J. HOWELL FLOURNOY, SHERIFF AND EX-OFFICIO TAX COLLECTOR FOR CADDO PARISH, LOUISIANA,
Appellant,

vs.

SAMUEL G. WIENER, WM. B. WIENER AND JACQUES L. WIENER.

APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA.

STATEMENT AS TO JURISDICTION.

EUGENE STANLEY,
Attorney General of Louisiana,
Counsel for Appellant.

BOOTH & LOCKARD,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 252

J. HOWELL FLOURNOY, SHERIFF AND EX-OFFICIO TAX COLLECTOR FOR CADDO PARISH, LOUISIANA,

Appellant,

vs.

SAMUEL G. WIENER, WM. B. WIENER AND JACQUES L. WIENER,

Appellees.

STATEMENT AS TO JURISDICTION.

Conformably to paragraph 1 of Rule 12 of the Supreme Court of the United States, the appellant files herewith his separate statement, particularly disclosing the basis upon which he contends that the Supreme Court of the United States has jurisdiction upon direct appeal to review the decree here in question.

(a) The Basis Upon Which It Is Contended That the Supreme Court Has Jurisdiction.

In this suit, the appellees, the universal legatees of Samuel G. Weiner, Jr., deceased, have drawn in question the validity of Section 402(b) (2) of the Federal Revenue Act

of 1942 approved October 21, 1942 (Public Law—77th Congress); it being contended by the said appellees that the Act of Congress referred to is violative of the Fifth Amendment to the Constitution of the United States and of Section 8 of Article 1 of the Federal Constitution. This issue was raised by formal "Plea of Unconstitutionality" (R. 14).

The trial court sustained the contention of appellees (R. 19) and held the statute to be unconstitutional upon both grounds pleaded. The Supreme Court of Louisiana, upon appeal, affirmed the judgment of the District Court, holding that the Act of Congress is violative of the Fifth Amendment to the Federal Constitution.

(b) Statutory Provision Believed to Sustain Jurisdiction.

Appellant respectfully shows that the case is one in which, under the legislation in force when the Act of January 31, 1928 (45 Stat. L. 54) was passed, to-wit: under Sec. 237(a) Judicial Code (28 U. S. C. A. 344), a review could be had in the Supreme Court of the United States on writ of error, as a matter of right; in that the Supreme Court of Louisiana has herein held the Act of Congress relied upon by appellant to be unconstitutional.

(c) The Statute Whose Constitutionality Is Involved.

The statute of the United States, the validity of which is involved, is Section 402(b) (2) of the Revenue Act of 1942, approved October 21, 1942, which amends paragraph 811(e) of Title 26 of the United States Code, providing what shall be included in the gross estate of the decedent in respect of estate taxes, by adding thereto the following:

> "(2) Community interests. To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as

may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition." (Chapter 619, 2d Session, 77th Congress, Public Law 753.)

Both the District Court and the Supreme Court of the State held said statute void as in contravention of the Federal Constitution.

(d) Date of Judgment or Decree.

The date of the judgment and decree sought to be reviewed herein is June 14, 1943. Application for rehearing, filed by the appellant, was denied July 15, 1943. The petition for appeal herein is presented and filed at the same time as there is being presented to the Chief Justice of the Supreme Court of the State the petition for the allowance of an appeal to the Supreme Court of the United States, to-wit: July 17th, 1943.

(e) Nature of the Case and Rulings of the State Court Bringing the Case into the Jurisdiction of the Courts.

This case originated in the District Court upon a proceeding instituted by the appellees against this appellant to fix the amount of the inheritance tax due to the State of Louisiana. The Louisiana State inheritance tax law (Act 127 of 1921 as amended by Act 44 of 1922 and by Act 119 of 1932) provides:

"Whenever the aggregate amount of all inheritance, succession, legacy and estate taxes actually paid to the

several states of the United States in respect to any property owned by such decedent shall be less than eighty per cent (80%) of the estate tax payable to the United States under the provisions of the said Federal Revenue Act of 1926, but not otherwise, the difference between said amount and said eighty per cent (80%) shall be paid to the State of Louisiana."

In order to determine the amount of State inheritance tax, it is, therefore, essential, first to ascertain the amount of the estate tax payable to the United States under the provision of the Federal Statute referred to in the State enactment.

For the purpose of ascertaining the amount of the Federal Estate Tax, it is furthermore, of course, essential that the basis upon which such tax is to be calculated, to-wit: the valuation under the Federal Statute, be determined; since such valuation obviously is the yardstick for the measurement of the Federal Estate Tax, and, consequently, of the State Inheritance Tax, which, as prescribed in the State statute referred to, is to be eighty per cent of the amount of the Federal Tax, calculated under the rates prescribed by the Federal Revenue Act of 1926.

The amendment to the Federal Estate Tax law contained in the statute which was held by the State Court to be unconstitutional (Sec. 402(b) of the Revenue Act of 1942), directs that, in the case of the death of husband or wife in a community property state, the value of the entire community (less certain exceptions immaterial here) must be included. In other words, that the valuation of the estate for Federal Tax purposes must be based upon the valuation of the entire community.

Thus, in order to compute the amount of inheritance tax due to the State authorities, it is essential that the provisions of this Federal Statute be applied.

The appellees assert, however, that the Federal Statute is unconstitutional. This contention was sustained by the trial court and by the Supreme Court of the State. If the statute be constitutional, then the State inheritance tax is dependent upon the application of the Federal rates to the valuation of the entire community. If the Federal Statute is unconstitutional, then the State tax, just as the Federal tax, has as its yardstick, the value only of one-half of the community property.

Thus, the constitutionality *vel non* of the Federal Statute of 1942 is the pivotal question in this case. Indeed it is the sole question involved.

Appellant contends that the questions involved are substantial and that the constitutionality of the statute is supported by the following decisions of the Supreme Court of the United States:

Tyler v. *United States*, 281 U. S. 497;
United States v. *Jacobs*, 306 U. S. 363.

Statement Respecting Opinions Below.

In the trial court, the District Court gave no written reasons for its opinion, other than those stated in the formal decree. The Supreme Court of Louisiana handed down a unanimous opinion sustaining that decree and holding the Federal statute to be violative of the Fifth Amendment to the Constitution of the United States.

Copy of the decree of the District Court and of the opinion of the Supreme Court are attached hereto and marked "Exhibits A and B" respectively.

It is respectfully submitted that the appeal herein is properly allowed; that the Federal question involved is substantial; and that the decisions referred to fully sustain

the contention of the appellant that the statute here in question is constitutional; and, consequently, that the decision of the State Court is wrong and should be reversed.

Respectfully submitted,

(Signed) BOOTH & LOCKARD,
EUGENE STANLEY,
Attorneys for Appellant.

EXHIBIT "A".

FIRST JUDICIAL DISTRICT COURT,
CADDO PARISH, LOUISIANA

No. 86,893

SUCCESSION OF SAM WIENER, JR.

On Rule to Fix Inheritance Tax and to Send Into Possession.

In this cause, by reason of the law and the evidence being in favor thereof, and for the reasons orally assigned,

It Is Ordered, Adjudged and Decreed that the plea of unconstitutionality herein filed by the plaintiffs in rule be and the same is hereby sustained.

Accordingly, It Is Further Ordered, Adjudged and Decreed that so much of the Federal Revenue Act of 1942 approved on October 21, 1942, as seeks to subject to the Federal Estate Tax, and consequently makes subject to the provisions of the State Inheritance Tax under Act 119 of 1932, and amendments thereof, the property of which the surviving wife of the decedent had a present and vested interest prior to his death, is violative of Section 8 of Article I of the Federal Constitution for want of uniformity throughout the United States, and is likewise violative of the Fifth Amendment to the Constitution of the United States in that its application here would deprive the heirs of the decedent of their property without due process of law.

It is, therefore, Further Ordered, Adjudged and Decreed that the Inheritance Tax due by the heirs and legatees of the decedent, who are plaintiffs in this rule, may be based only upon the one-half of the community which was owned by the decedent at and prior to his death, any by his last will and testament transmitted to said heirs.

It is accordingly Further Ordered, Adjudged and Decreed that there be judgment in favor of the State Collector of Inheritance Taxes and against the plaintiffs in rule, Samuel G. Wiener, William B. Wiener and Jacques L. Wiener, in the sum of Eighty Two Hundred Twenty Four Dollars and

Nine Cents ($8224.09) as inheritance taxes due to the State of Louisiana; and that upon the payment of the said sum to the Sheriff of Caddo Parish and Ex-Officio Collector of State Inheritance Taxes, the said Samuel G. Wiener, William B. Wiener and Jacques L. Wiener be, as the universal legatees of Sam Wiener, Jr., deceased, sent into unconditional possession of his Succession.

It Is Further Ordered, Adjudged and Decreed that there be reserved to the State Collector of Inheritance Taxes by further and supplemental proceedings to avail himself of the reservation contained in the sixth paragraph of the agreed statement of facts herein filed.

Thus Done, Read and Signed in open Court on this the 10th day of March, 1943.

ROBERT J. O'NEAL,
Judge.

First Judicial District Court, Caddo Parish, Louisiana.

EXHIBIT "B".

SUPREME COURT OF LOUISIANA

No. 37,089

SUCCESSION OF SAM WEINER, JR.

Appeal from the First Judicial District Court for the Parish of Caddo; Hon. Robert J. O'Neal, Judge

ROGERS, J., *Absent.*
FOURNET, *Justice:*

Samuel G., William B., and Jacques L. Wiener, the universal legatees and heirs of the late Sam Wiener, Jr., proceeding under Act No. 127 of the Extra Session of 1921, as amended by Act No. 44 of 1922, ruled the sheriff and ex-officio tax collector for the parish of Caddo to fix the amount of inheritance tax due the state of Louisiana on the property bequeathed to them by their father under the terms of

his will, being the undivided half interest in the property acquired during the community of acquets and gains that existed between him and their mother, who survives the decedent and owns the other undivided half of the estate.

Answering this rule, the tax collector averred the heirs owed "an inheritance tax on the *entire* community estate rather than upon the one-half interest in the community inherited by them," for in Section 402(b) (2) of the Revenue Act of 1942, (26 U. S. C. A. 811 e-2) Congress has included the entire community in which a decedent had an interest at the time of his death in his taxable estate and the Louisiana Legislature, in Section 2 of Act. No. 119 of 1932, provided that the estate tax to be levied in this state shall be at least 80% of the estate tax payable to the United States. (Italics ours.)

The plaintiffs in the rule then interposed a plea challenging the constitutionality of this act of Congress, as being in contravention of Section 8 of Article I of the Constitution of the United States and of the 5th amendment thereto.

The district judge, after the case was tried on an agreed statement of facts, sustained the plea of unconstitutionality on both counts, decreeing the inheritance tax due the state of Louisiana by the plaintiffs in the rule to be $8,224.09, based on the property bequeathed them by their father, that is, on his half of the community property.

The tax collector appealed from this judgment, and the United States, filing a brief Amicus Curiae through the office of its Attorney General, joined the appellant in upholding the constitutionality of Section 402(b) (2) of the Revenue Act of 1942, in the event this court concludes, contrary to the government's contention, the constitutionality thereof must be passed on.

There is no controversy between the parties with respect to the facts of the case. Sam Wiener, Jr., died in the city of Shreveport, Louisiana, on December 10, 1942, leaving a last will and testament under which his entire estate was bequeathed to his three children, the plaintiffs in this rule. All of the property and assets standing in the name of the decedent at the time of his death were acquired by and

belonged to the community that had existed between him and his surviving widow, Florence Loeb, to whom he was married on February 12, 1907, the appraised value of which, after deduction and payment of debts, succession charges, and taxes is $608,272.46. It is agreed between the plaintiffs in the rule and the respondent tax collector that if the tax is to be computed on the property received by the heirs as the legatees of their father, that is, on $304,136.23, his half of the community property, the amount of the inheritance tax due the state is $8,224.09, but that if it is to be computed on the entire community, as the tax collector contends, the inheritance tax due by them is $14,330.90.

In the year 1932, the Louisiana legislature, to obtain the benefit of the provisions contained in Section 301 (b) of the Revenue Act of 1926 making it mandatory that a credit of 80% be allowed against the inheritance tax due the federal government for inheritance estate, and succession taxes paid the states with respect to property included in the gross estate, adopted its Act No. 119 providing: "Whenever the aggregate amount of all inheritance, succession, legacy and estate taxes actually paid to the several states of the United States in respect to any property owned by such decedent shall be less than eighty per cent (80%) of the estate tax payable to the United States under the provisions of the said Federal Revenue Act of 1926, but not otherwise, the difference between said amount and said eighty per cent (80%) shall be paid to the State of Louisiana."

Under the express provisions of Act No. 127 of the Extra Session of 1921, as amended by Act No. 44 of 1922, the heirs or legatees of a deceased person are required to have the interitance tax fixed within six months after the death of the party in whose estate they are benefiting, a fee equivalent to 1% per month being charged if such payment is made after the six months period, increased to 2% per month after 12 months. They cannot be placed in possession of the property so inherited until such tax has been paid.

Now, because of the Congressional adoption of Section 402(b) (2) of the Revenue Act, amending Section 811(c)

of the Revenue Code of 1939 (26 U. S. C. A. 811(e), the tax collector of Caddo parish is contending inheritance and estate taxes in this state, under Act No. 119 of 1932, must be computed on the basis established in that section, that is, that the value of the gross estate of the decedent to be taxes must be determined by including therein "the value at the time of his death of all property", such gross estate where community interests are involved consisting of "The extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State * * * except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition." Section 402(b) (2) of the Revenue Act of 1942; 26 U. S. C. A. 811(e) (2).

Under the express provisions of the Louisiana Revised Civil Code, "Every marriage contracted in this State, superinduces of right partnership or community of acquets or gains" (Article 2399), and "*This partnership* or community *consists* of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, *of the produce of the reciprocal industry and labor of both husband and wife, and of the estate which they may acquire during the marriage*, either by donations made jointly to them both, or by purchase, or in any other similar way, *even although the purchase be only in the name of one of the two and not of both, because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase.*" *Article 2402.* (Italics ours.)

That this community is a partnership in which the husband and wife own equal shares, their title thereto vesting at the very instant such property is acquired, is well settled in this state (Dixon *v.* Dixon's Executors, 4 La. 188; Theall *v.* Theall, 7 La. 226; Succession of Marshal, 118 La. 212, 42 So. 778; Succession of May, 120 La. 692, 45 So. 551; Beck

v. Natalie Oil Co., 143 La. 154, 78 So. 430; Ramsey *v.* Beck, 151 La. 190, 91 So. 674, Phillips *v.* Phillips, 160 La. 813, 107 So. 584; Pfaff *v.* Bender, 38 F. (2d) 642; and Bender *v.* Pfaff, 282 U. S. 127, 75 L. Ed. 252) and the federal government, in levying inheritance or estate taxes, has consistently recognized that the law of the state is determinative of the interest left by the decedent. Liebman *v.* Fontenot, 275 Fe. 688; Warburton *v.* White, 176 U. S. 484, 44 L. Ed. 555; Arnett *v.* Reade, 220 U. S. 311, 55 L. Ed. 477; and 32 Opinions Attorney General 435.

It is our opinion, therefore, that the construction sought to be placed on Act No. 119 of 1932 by the tax collector—that is, that in arriving at the amount of inheritance taxes due by the plaintiffs in this rule on the property bequeathed to them by their father, there must be included in his gross estate not only the half interest in the community owned by him and willed to them, but also the half of the community belonging to their mother, who survives—would render it violative of the due process guaranteed by the 14th amendment to the Constitution of the United States, since such interpretation would result in the imposition of a tax upon those succeeding to the estate of a decedent measured in part by the property comprising the estate of another, to which the estate of the decedent is in no way related.

In the case of Hoeper *v.* Tax Commission, 284 U. S. 206, 76 La. Ed. 248, the Supreme Court of the United States, in reversing a decision of the highest court in Wisconsin maintaining the validity of a statute of that state requiring the husband and wife to file joint income tax returns and levying a tax on a graduated scale on the combined total of the two incomes, pointed out that the question presented was whether a state has the power to measure the income tax owed by the husband on an income that was, in part, that of his wife, and concluded that "*because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the 14th Amendment.* That which is not in fact the taxpayer's in-

come cannot be made such by calling it income." See, also, Knowlton *v.* Moore, 178 U. S. 41, 44 L. Ed. 969, 20 S. Ct. 747. (Italics ours.)

The limitation placed upon the states by the 14th amendment is likewise placed on the federal government under the 5th amendment.

In the case of Nichols *v.* Coolidge, 274 U. S. 531, 71 L. Ed. 1184, 52 A. L. R. 1081, 47 S. Ct. 710, the Supreme Court of the United States expressly recognized that the congressional power to levy an inheritance tax is subject to the restrictions and limitation found in the 5th amendment, holding that so much of Section 402 (c) of the Revenue Act of 1919 requiring the value of property donated by a decedent prior to the passage of such act should be included in computing the gross estate on which the inheritance or estate tax was to be levied, amounted to a taking of property without due process of law, in violation of the 5th amendment, saying:

"This court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the 5th amendment. Brushaber *v.* Union P. R. Co., 240 U. S. 1, 60 L. Ed. 493, L. R. A. 1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713; Barclay & Co. *v.* Edwards, 267 U. S. 442, 69 L. Ed. 703, 45 Sup. Ct. Rep. 348. See also Knowlton *v.* Moore, 178 U. S. 41, 44 L. Ed. 969, 20 Sup. Ct. Rep. 747. And we must conclude that Section 402 (c) of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation."

This section of the Revenue Act of 1919 (402-c) was amended in 1926 (302-c) to provide that transfers of property made within two years prior to the death of a person should be calculated in computing his estate for the purpose of levying an inheritance tax thereon, as having been made in contemplation of death, and the Supreme Court, again passing on the constitutionality of the statute, answering

affirmatively the question certified to it by the Circuit Court of Appeals for the Third Circuit of whether or not the sentence in this section reading: "Where within two years prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title," constituted a violation of the due process clause of the 5th Amendment to the Constitution of the United States, had this to say:

"In substance and effect, the situation presented in the Hoeper Case is the same as that presented here. In the first place, *the tax, in part, is laid in respect of property shown not to have been transferred in contemplation of death and the complete title to which had passed to the donee during the lifetime of the donors;* and secondly, the tax is not laid upon the transfer of the gift or in respect to its value. It is laid upon the transfer, and calculated upon the value, of the estate of the decedent, such value being enhanced by the fictitious inclusion of the gift, and the estate made liable for a tax computed upon that value. * * * *The result is that upon those who succeed to the decedent's estate there is imposed the burden of a tax, measured in part by property which comprises no portion of the estate, to which the estate is in no way related, and from which the estate derives no benefit of any description.* Plainly, this is to measure the tax on A's property by imputing to it in part the value of the property of B, a result which both the Schlesinger and Hoeper cases condemn as arbitrary and a denial of due process of law. *Such an exaction is not taxation but spoilation.* 'It is not taxation that government should take from one the profits and gains of another. That is taxation which compels one to pay for

the support of the government from his own gains and of his own property.' United States *v.* Baltimore & O. R. Co., 17 Wall. 322, 326, 21 L. Ed. 597, 599." Hiener *v.* Donnan, 285 U. S. 312, 76 L. Ed. 772. (Italics ours.)

It is obvious, therefore, that the interpretation sought here with respect to Section 402 (b) (2) of the Revenue Act of 1942, is to the same effect as that sought with reference to Act. No. 119 of 1932, that is, the inclusion in the taxable estate of the decedent Wiener his wife's property, in violation of the 5th Amendment to the Constitution of the United States.

The conclusion we have reached in this case is in keeping with the decision of the United States Supreme Court in the case of Bender *v.* Pfaff, supra, where that court recognized that under the law of Louisiana the wife is not only vested with the ownership of half of the community property from the moment it is acquired, but is likewise the owner of half of the community income. It necessarily follows that the wife's share of this income was utilized in acquiring the property found in the community estate that existed between her and her deceased husband.

In fact, counsel for the tax collector concede in their brief that if the Pfaff case "stood alone in the jurisprudence, undoubtedly the position of the succession here would be correct, but there are other cases pointing to a contrary result in so far as the Federal Estate law is concerned," citing the cases of Tyler *v.* United States, 281 U. S. 497, 74 L. Ed. 991, and United States *v.* Jacobs, 306 U. S. 363, 83 L. Ed. 763.

A study and analysis of these two cases, in our opinion, conclusively demonstrates that they are neither controlling of the issue presented in this case, nor apposite.

In the Tyler case, the Commissioner of Internal Revenue included in Tyler's gross estate certain property held by him and his wife under a tenancy by the entirety in Maryland and Pennsylvania, that is, (1) corporate shares that, at the time of the conveyance creating the tenancy by the entirety with respect thereto, were owned solely by the decedent; (2) ground rent and real estate purchased with the separate funds of the husband though conveyed to both

of them as tenants by the entirety; and (3) real estate owned by the decedent at the time it was conveyed to a third person and reconveyed to the decedent and his wife as tenants by the entirety. The question was whether or not the inclusion of this property in the gross estate of the decedent for the purpose of computing the tax upon the transfer of the net estate under Section 202 (c) of the Revenue Acts of 1916 and 1921 contravened the 5th Amendment to the Constitution of the United States. The court found that none of the property constituting the tenancy thus created had, prior thereto, ever belonged to the surviving spouse, and that although, under the law of Maryland and Pennsylvania, no interest in the property held by tenants by the entirety passed to the surviving spouse upon the death of one of them, the whole continuing in the survivor, such law was based upon the amiable fiction of the common law that the husband and wife are but one person—constitute one unit—and that the wife while entitled to the joint use and possession of the property during the lifetime of her husband, was without right to dispose of any part thereof by will or pass it to her legal heirs, concluding that: "*These circumstances, together with the fact, the existence of which the statute requires, that no part of the property originally had belonged to the wife, are sufficient, in our opinion, to make valid the inclusion of the property in the gross estate which forms the primary base for the measurement of the tax,*" and pointing out that "The evident and legitimate aim of Congress was to prevent an avoidance, in whole or in part, of the estate tax by this method of disposition during the lifetime of the spouse who owned the property, or whose separate funds had been used to procure it; and the provision under review is an adjunct of the general scheme of taxation of which it is a part, entirely appropriate as a means to that end." (Italics ours.)

In the Jacobs case, which arose in Illinois, the payment of an estate tax was sought to be evaded by the creation of a joint tenancy, a fiction similar to that of the tenancy by the entirety in the Tyler case, and the question was whether or not "the entire value or only one-half of the value of

real property—purchased by a decedent with his own funds and held at his death by his wife and himself under a joint tenancy set up prior to 1916—may be included in the gross estate under the 1924 Revenue Act." There the court, relying on the decision in the Tyler case, concluded that "A tenancy by the entirety 'is essentially a *joint tenancy*, modified by the common law theory that husband and wife are one person,'" and that, as in a tenancy by the entirety, the wife could not dispose of her interest therein by will or pass it to her legal heirs at her death. The court specifically pointed out that the decedent paid the entire purchase price for the property held in the *joint tenancy* with his separate funds and that it was clearly the intention of Congress "to include in the gross estate of a decedent the full value at death of all property owned by him and any other in joint tenancy or by the entirety * * * in so far as the property or consideration therefor is traceable to the decedent." (Italics ours.)

Thus it may be seen that the pivotal points upon which the decisions in these two cases turned were that the wife contributed nothing, either in money or property, toward the creation of the joint tenancy or the tenancy by the entirety, and that she was powerless to dispose of any interest in such estate by will or through legal heirship.

In Louisiana, the situation is entirely different, for here the Civil Law prevails, and the theory of the Civil Law is that the acquisition of all property during the marriage is due to the joint or common efforts, labor, industry, economy, and sacrifices of the husband and wife; in her station the wife is just as much an agency in acquiring this property as is her husband. In Louisiana, therefore, the wife's rights in and to the community property do not rest upon the mere gratuity of her husband; they are just as great as his, and are entitled to equal dignity. Unlike the wife's interest in the common law states, where joint tenancies and tenancies by the entirety abide, the wife's interest in the community property in Louisiana is more than a mere expectancy or hope and her husband's death is not the force that generates her title thereto and her rights therein. Over a hundred years ago, in the case of Dixon *v.* Dixon's

Executors, 4 La. 188, this court held that the rights of the wife, as well as those of the husband, in and to the marital gains, grow out of the marriage contract itself and do not originate only when it is dissolved, and this is now our settled law, as was pointed out in the case of Phillips *v.* Phillips, 160 La. 813, 107 So. 584. She is the half-partner and owner of all acquisitions made during the existence of the community, *whether they be property or income.* She has the same privilege as her husband of disposing of her interest therein by will, and, in the absence of a will, at her death her interest in the community property passes to her legal heirs in the same manner as her husband's interest therein passes to his legal heirs in the absence of a will.

It is true that in weaving this harmonious commercial partnership around the intimate and sacred marital relationship, the framers of our law and its codifiers saw fit, in their wisdom, to place the husband at the head of the partnership, but this did not in any way effect the status of the property or the wife's ownership of her half thereof. As expressed in Poe *v.* Seaborn, 282 U. S. 101, 76 L. Ed. 239, "The law's investiture of the husband with broad powers by no means negatives the wife's present interest as a co-owner." The community partnership had to be placed in charge of a managing partner for very expedicious and necessary reasons,—dealings with third parties with respect to the community property had to be protected from the nullifying actions of the other spouse; the confusion ensuing from dual control had to be avoided. And the husband was made the managing partner of the community and charged with the administration of its effects, as well as with the alienation of its effects and revenues by onerous title, because he was deemed the best qualified to act.

But the redactors of our law did not neglect to hedge the wife's interest in the community property with protecting rights. They subjected the husband's powers to various substantial checks and limitations corresponding to those imposed upon any managing partner or agent and provided for the wife's right to assert such limitations. He is, by statute, expressly prohibited from donating the com-

munity real estate or the whole or a portion of the movables, and he may not dispose of the community income in any manner by fraud to injure the wife. No portion of the community income can be used to improve his separate estate or to pay his separate debts. The wife may, without obtaining a divorce, and even in the absence of fraud, sue for a dissolution and liquidation of the community partnership and secure the delivery into her own exclusive management and control of her half of the community property whenever her husband proves to be incompetent, a bad manager, of a reckless or speculative disposition, or whenever his affairs are in such disorder that her property rights are jeopardized. Upon the institution of such a suit, she may, by injunction, restrain her husband from disposing of any portion of the community property and she may likewise enjoin his disposition of any part of the community partnership property when, even though he is a good business manager, she provokes a dissolution and liquidation of the community through divorce proceedings because he is otherwise an unfaithful partner. In the event of a divorce, the wife is entitled absolutely and of right to an exact one-half of the community property and the court has no discretion or power to award her less. This is true even though the husband himself provokes the divorce because the wife has been guilty of the very serious misconduct of adultery. The wife's right to dispose of her interest in the community property by will is absolutely unrestricted, and even though she wills it to her paramour, her husband has no right to complain. If the wife does not make a will, her children take her share of the community property to the exclusion of the husband; and this is so even though the children are the wife's illegitimate children by another man. In the event the wife dies leaving neither a father nor mother nor decedents, the husband, under the express provisions of Article 915 of the Revised Civil Code, inherits her share of the community property, provided there is no will, and in such case the state of Louisiana, as well as the United States, assesses an estate tax on the property so inherited. The same is true when the wife wills her half of the community to her husband.

It is obvious, therefore, that the wife's interest in the community property in Louisiana does not spring from any fiction of the law or from any gift or act of generosity on the part of her husband but, instead, from an express legal contract of partnership entered into at the time of the marriage. There is no substantial difference between her interest therein and the interest of an ordinary member of a limited or ordinary partnership, the control and management of whose affairs has, by agreement, been entrusted to a managing partner. The only real difference is that the limitations placed on the managing partner in the community partnership are fixed by law, while those placed on the managing partner in an ordinary or limited partnership are fixed by convention or contract. And yet, we are asked to place an interpretation on Act No. 119 of 1926 and Section 402(b) (2) of the Revenue Act of 1942 that would result in the inclusion in the estate of the managing partner of an interest in the community partnership to which he never had any claim and which was, in fact, during his lifetime and is now, owned by his wife.

It is our conclusion, therefore, that the trial judge, in fixing the estate taxes due by the plaintiffs in the rule on the property willed to them by their late father, Sam Wiener, Jr., properly excluded from the mass of the estate their mother's half of the community property.

For the reasons assigned, the judgment of the lower court is affirmed.

(7462)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 252

J. HOWELL FLOURNOY, SHERIFF AND EX-OFFICIO TAX COLLECTOR, APPELLANT,

versus

SAMUEL G. WIENER, WILLIAM B. WIENER AND JACQUES L. WIENER, APPELLEE.

BRIEF FOR APPELLANT.

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OPINIONS BELOW.

The opinion of the Supreme Court of the State of Louisiana in this cause (R. 19) is not reported in the State Reports, but is found in 14 So. 2d. 475.

GROUNDS ON WHICH JURISDICTION INVOKED.

This case is here on direct appeal from a judgment of the Supreme Court of Louisiana, jurisdiction being claimed under Judicial Code, Section 237 (a) [28 U. S. C. A., Section 344 (a)], due to the fact that an Act of Congress was declared unconstitutional.

Appellees have not filed any statement disclosing any matter or ground making against the jurisdiction of this Honorable Court and we have been advised informally that none will be tendered. Nevertheless, we affirmatively assume the burden, which rests on us, of showing jurisdiction.

The only issues raised by the pleadings in the lower court were challenges to the constitutionality of Section 402 (b) (2) of the Federal Revenue Act of 1942 [26 U. S. C. A. 811 (e) (2)] assailed as violating the uniformity provisions of Section 8 of Article One of the Federal Constitution and the due process clauses of the 5th Amendment thereto (R. 9). The matter was disposed of on stipulation which did not enlarge the pleadings (R. 10). Within the limits of the pleadings the trial court in its formal decree (R. 13) found the said Act of Congress to be unconstitutional on both the grounds urged. An appeal was taken to the Supreme Court of the State of Louisiana and the issues of constitutionality raised in the lower court, and these only, were argued to the court, except that in the Supreme Court of Louisiana an additional plea was filed, attacking Act 119 of the Louisiana Legislature for 1932, as sought to be interpreted herein, on the ground that it contravened the 14th Amendment to the Federal Constitution (R. 17).

The opinion of the Supreme Court of Louisiana purports to decide no matters other than the tendered constitutional questions. No exclusively non-Federal question was ever tendered. The decision of the Supreme Court of the State rests upon no non-Federal grounds. But for

the enactment of the assailed Federal statute, there would have been, and could have been no possible conflict between the parties. As a matter of exclusive state law, the Tax Collector could not have resisted the contention of appellees. He did resist it, solely upon the ground that Congress having made the measure of the Basic Estate Tax the valuation of the entire community, he was in turn bound by the mandatory provisioss of the State law to exact a State Inheritance Tax equal to eighty percent of that which the Federal Government was demanding by virtue of the statute under attack.

Thus, the sole issue in the case rested below, and rests here, upon the quantum of the Basic Estate Tax which is due the Federal Government: and that issue, in turn, rests upon the question of the constitutionality of Section 402 (b) of the Revenue Act of 1942.

Thus, it is impossible to dissociate from pleading or judgment the successful drawing in question by appellees of the constitutionality of the Federal Statute.

The case is one wherein an appeal lies to this Court as a matter of right (Section 237(a), Judicial Code, 28 U. S. C. A. 344, as amended by the Act of January 31, 1928, 45 Stat. 54); for it does not present a question of a Federal and non-Federal ground lying horizontally, side by side—their position is a vertical one, for the asserted non-Federal ground has utterly no foundation upon which to rest except the Federal statute here assailed as unconstitutional.

Hence, what this Court said in *Abie State Bank v. Bryan*, 282 U. S. 765, 773, 75 L. Ed. 690, is controlling:

> "But the federal ground being present, it is incumbent upon this court, when it is urged that the decision of the state court rests upon a non-federal ground, to ascertain for itself, in order that constitutional guaranties may appropriately be enforced, whether the asserted non-federal ground independently and adequately supports the judgment. Enterprise Irrig. Dist. v. Farmers Mut. Canal Co., 243 U. S. 157; Union P. R. Co. v. Public Serv. Commission, 248 U. S. 67, 69, 70; Ward v. Love County, 253 U. S. 17, 22; Broad River Power Co. v. South Carolina, 281 U. S. 537, 540, 282 U. S. 187, ante, 287. As this court said in Enterprise Irrig. Dist. vs. Farmers Mut. Canal Co., 243 U. S. 157, supra: 'But where the non-federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain'. See Creswell v. Grand Lodge, K. P., 225 U. S. 246."

In the more recent case of *State Tax Commission v. Van Cott*, 306 U. S. 511, 514, 83 L. Ed. 950, this Court ordered up for review on certiorari a decision of the Supreme Court of Utah which had held that, under a provision of the State statute exempting from income tax "compensation for services rendered the United States in connection with the exercise of an essential governmental function", the salary of an attorney for the Reconstruction Finance Corporation was exempt. The decision of the State court rested upon decisions of this Court which the State court construed as holding that the attorney was exercising an essential governmental function.

When the case was submitted here, the Solicitor General appeared as *amicus curiae*, denying the jurisdiction of this Court on the ground that the case did not depend upon the solution of a Federal question. This Court said, however:

> "If the court were only incidentally referring to decisions of this Court in determining the meaning of the State law, and had concluded therefrom that the statute was itself intended to grant exemption to respondent, this Court would have no jurisdiction to review that question. But, if the State court did in fact intend alternatively to base its decision upon the State statute and upon an immunity it thought granted by the Constitution as interpreted by this Court, these two grounds are so interwoven that we are unable to conclude that the judgment rests upon an independent interpretation of the State law."

In the subsequent case of *Breisch v. Central R. R. of New Jersey*, 312 U. S. 484, 491, 85 L. Ed. 965, this Court said:

> "'In the Van Cott case we were reviewing an application of Federal law by a State court to a solution of a State's problems",

a concise statement of the issue here, where the quantum of estate tax must depend absolutely upon the constitutional validity of a Federal statute, whose such validity is directly drawn in question by the pleadings, and which has been, by the highest court of the State, declared unconstitutional.

We do not urge that this Court has obligatory appellate jurisdiction under Judicial Code, Section 237 (a) Title 28, U. S. C. A., Section 344 (a), except as to the

ruling of the lower court on the constitutionality of the Federal statute measured by the 5th Amendment. However, the decision on the application of the State statute under the 14th Amendment was precisely for the same causes and reasons for the decision as to the constitutionality of the Act of Congress under the 5th Amendment. They are so interwoven that the decision on the one cannot be severed from the other. Moreover, should the Court conclude that the only issue in the case was the matter of the constitutionality of the State statute under which the tax herein is sought, then it is required to treat this appeal as a petition for writ of certiorari under Judicial Code, Section 237 (c), 28 U. S. C. A. 344 (c).

Such cases as *Miller's Executors v. Swann*, 150 U. S. 132, 37 L. Ed. 1028 and *Gully v. First National Bank*, 299 U. S. 109, 81 L. Ed. 70, argued in the State court by the representative of the United States, in no way militate against this Court's jurisdiction. In the recent case of *Colorado National Bank v. Bedford*, 310 U. S. 41, 47, 84 L. Ed. 1067, this Court, in sustaining its jurisdiction of a direct appeal to the Supreme Court of Colorado from a judgment sustaining as against an asserted Federal right the provisions of a State tax statute, said:

> "As the statute was held valid after the conclusion of the Supreme Court of Colorado that the manner of State taxation of national banks must accord with Rev. Stat., Sec. 5219, 12 USCA Sec. 548, and must not interfere with federal functions, it seems clear the federal question as to the validity of the statute as tested by the Constitution and laws of the United States was necessarily involved and decided. This gives this Court jurisdiction of the appeal.

"Gully v. First Nat. Bank, relied upon by the treasurer, dealt with the right to remove to a federal court because the cause of action arose under the federal laws, but the issue here is the right to appeal where a state statute is held valid against a defense of repugnancy to the same laws. The difference is brought out in the Gully case, where it is said: 'If there were no federal law permitting the taxation of shares in national banks a suit to recover such a tax would not be one arising under the Constitution of the United States, though the bank would have the aid of the Constitution when it came to its defense."

In neither of the cases referred to was there present, as here, the situation of a direct drawing into question of the validity of a Federal statute and the utter dependence of the State's contention upon that Federal statute's validity.

Smith v. Kansas City Title & T. Co., 255 U. S. 180, 65 L. Ed. 577, while dealing, not with the question of this Court's jurisdiction over a decision of a State court but with that of the original jurisdiction of the Federal District Court, is of interest in that this Court there rejected the contention (see dissenting opinion, page 215) advanced below by the Attorney General on his construction of *Miller v. Swann*. In *Smith v. Kansas City Title & T. Co.*, suit had been filed in the District Court to enjoin the defendant from investing its funds in Farm Loan bonds, the contention being that the Federal Farm Loan Act (39 Stat. 360, as amended 40 Stat. 431) was unconstitutional. Examining the question as to whether the suit was one arising

under the Federal Constitution, or under the State law, the Court, pointing out (page 201)

> "It is, therefore, apparent that the controvery concerns the constitutional validity of an act of Congress which is directly drawn in question. The decision depends upon the determination of this issue",

concluded:

> "The District Court had jurisdiction under the averments of the bill, and a direct appeal to this court upon constitutional grounds is authorized."

Here, it seems obvious that this case is not one in which a Federal question simply lurks in the background, or where a decision is sought of a State question upon the analogy of decisions upon parallel Federal issues. It is not a case where a State statute follows a Federal statute. It is a case where the power of the State sought to be exercised, depends wholly and entirely upon the validity of a Federal enactment. In such case, it is respectfully submitted, jurisdiction is clear.

STATEMENT OF THE CASE.

Sam Wiener, Jr., a Louisiana citizen, died in Caddo Parish, Louisiana, his domicile, leaving property standing in his name of a net valuation of $608,272.42 after the payment of debts, succession charges, etc., all of which was accumulated by him under the regime of the community which existed between the deceased and his wife who survived him.

In this succession, a rule was issued against the Tax Collector for Caddo Parish, Louisiana (R. 2), to fix the amount of the inheritance due the State of Louisiana, in which it was contended that the computation of the amount of the tax was to be made upon one-half of the estate only, to-wit, the sum of $304,186.21. The inheritance tax collector for Caddo Parish answered the rule setting up that in virtue of Paragraph 2 of Act 119 of the Legislature of Louisiana for the year 1932 (Dart's La. General Statutes, Vol. 6, Sec. 8582), the State of Louisiana was entitled to collect over and above the inheritance tax imposed by existing laws (Act 127 of 1921) an estate transfer tax, and contended that in the determination of the amount of this tax, the entire community should be taken as the basis of calculation rather than one-half thereof. Section 2 of Act 119 of 1932 reads:

> "Whenever the aggregate amount of all inheritance, succession, legacy and estate taxes actually paid to the several states of the United States in respect to any property owned by such decedent shall be less than eighty per cent (80%) of the estate tax payable to the United States under the provisions of the said Federal Revenue Act of 1926, but not otherwise, the difference between said amount and said eighty per cent (80%) shall be paid to the State of Louisiana."

This permissive provision in the Federal Revenue Act providing for this credit is set forth in Appendix A.

This contention that the computation should be on the whole rather than the one-half was due to a provision

in the Revenue Act of Congress for 1942, Section 402 (b) (2) 26 U. S. C. A., Sec. 811 (e) (2), whereby Congress included in the taxable estate of a decedent any interest which he might have held in community with his surviving spouse. This section reads:

> "*Community Interests.* To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition."

No part of this estate was compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse.

Section 4 of Act 119 of 1932 enjoins on the tax collecting authorities of Louisiana a liberal interpretation of the act to the end that there be gained for the Treasury of the State of Louisiana the full extent of the 80% credit (See Appendix B for this excerpt).

At this juncture, a formal plea to the constitutionality of the said Act of Congress was filed (R. 9), alleging

that the same was in contravention of Section 8 of Article One of the Constitution of the United States (which provision requires geographic uniformity in the imposition of excise taxes) and in contravention of the Fifth Amendment to the Constitution of the United States in that the Succession would be required to pay taxes upon property not belonging to it as determined by the law of the State.

The facts were stipulated (R. 10). The inheritance tax, strictly speaking, amounts to $8,224.09. The Inheritance Tax Collector claims an additional sum of $6,106.81 as an Estate Tax under the provisions of Section 2 of Act 119 of 1932. The Court will note that in the stipulation and in the pleadings, all the taxes are improperly referred to as "inheritance taxes", whereas in truth and in fact, only the sum of $8,224.09 is an inheritance tax and the sum of $6,106.81 claimed by the Collector, is an Estate Transfer Tax.

The District Court sustained the plea of unconstitutionality (R. 13) on both grounds, holding that it violated the uniformity requirements of Section 8 of Article One of the Constitution and of the due process clause of the 5th Amendment thereto. In the Supreme Court of Louisiana an additional plea of unconstitutionality was filed (R. 17) urging that Act 119 of 1932 of the Louisiana Legislature as it was sought to be interpreted herein violated the 14th Amendment to the Constitution of the United States. The Supreme Court of Louisiana affirmed the decision of the lower court (R. 19).

SPECIFICATION OF ERRORS.

Appellant asserts that the Court below was in error in the following respects:

(1) The Supreme Court of the State of Louisiana erred herein in holding that Section 402 (b) (2) of the Federal Revenue Act of 1942 was unconstitutional because violating the 5th amendment to the Federal Constitution.

(2) The Supreme Court of the State of Louisiana erred in holding that Act 119 of 1932 of the Legislature of the State of Louisiana was unconstitutional, as sought to be interpreted by appellant because violating the 14th amendment to the Constitution of the United States.

SUMMARY OF ARGUMENT.

We will endeavor to show that, conceding that the wife's interest in the community in Louisiana vests with its acquisition and is no mere expectancy, still it is far short of a full interest and lacks most of the attributes of ownership; that her interests are hedged about and restricted by her husband's equal, and in most respects, superior interests; that these restrictions end with her husband's death and because of it she has added to her community moiety for the first time important rights not theretofore enjoyed; that death is the "generating" cause of these additions within the rationale of the cases of *U. S. v. Jacobs*, 306 U. S. 363, 83 L. Ed. 763, and *Tyler v. United States*, 281 U. S. 496, 74 L. Ed. 991, making the wife's one-half interest in the community property a part of the taxable estate of her deceased husband.

ARGUMENT.

The appellees contend that death under Louisiana law is not the "generating" source of the rights of the surviving wife in the community property; and that as to Mrs. Wiener who survived her husband, one-half of the estate came to her not as a result of death, but to the contrary was her property throughout the period of the community and existed prior to death. It is argued that her one-half of the community forms no part of the decedent's estate and that to include her one-half in the decedent's estate is to compel her to pay taxes in part measured by the property of another. Thus substantially was the finding of the Supreme Court of Louisiana in this case.

Our position is that, conceding the full import of the decisions below and of *Phillips v. Phillips*, 160 La. 813, 107 So. 584 and *Bender v. Pfaff*, 282 U. S. 127, 75 L. Ed. 252, that the wife's interest is simultaneously vested with its acquisition, still that is not decisive of the issue here. The inquiry here is whether the deceased husband had and enjoyed certain rights or privileges quoad the wife's one-half interest in the community prior to his death; for it is the interest that *ceased* at death and not what is transferred which is within the reach of the Federal Estate Tax.

Said this Court in *Y. M. C. A. v. Davis*, 264 U. S. 47, 44 S. Ct. 291, 68 L. Ed. 558:

> "It was not a tax upon succession and receipt of benefits under the law or the will. It was death duties as distinguished from a legacy or succession tax. What this law taxes is not the interest

to which the legatees and devisees succeeded on death, but the interest which ceased by reason of his death."

We do not urge that the wife inherits from her husband in Louisiana; we merely contend that many important incidents of ownership—inherent in her husband's dominion and control over all the community property during life—are denied to the wife until the husband's death.

What we urge is not in derogation of the definition and character of the community property as found by the Supreme Court of Louisiana in this case and in *Phillips v. Phillips*, supra. Actually the decision below recognized this dominion and control of the husband (R. 28). This dominion is complete and exclusive. Article No. 2404 of the Revised Civil Code provides as follows:

"HUSBAND MASTER OF COMMUNITY—Gratuitous and fraudulent conveyances.—The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, *without the consent and permission of his wife.*" (Italics ours).

"He can make no conveyance inter vivos, by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the children of the marriage. A gratuitous title within the contemplation of this article embraces all titles wherein there is no direct, material advantage to the donor.

"Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefits of all persons.

"But if it should be proved that the husband has sold the common property, or otherwise disposed of

the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one-half of the property, on her satisfactory proving the fraud."

"Only the husband may judicially vindicate a community right", *Succession of Howell*, 177 La. 276, 148 So. 48. This means that the wife has no standing in Court in any event, even to assert a community interest against a trespasser. The husband may even make a gratuitous donation of the movable property (personal) of the community. (Revised Civil Code 2404). Even if the title to the community property should stand in the name of the wife, she cannot alienate or mortgage it without the husband's concurrence and direction. *Bywater v. Enderle*, 175 La. 1098, 145 So. 118.

The husband's relation to the community property is so intimate that he is personally liable for the community debts and can be made to meet them out of his separate property. *Hellberg v. Hyland*, 168 La. 493, 122 So. 593, while the wife's relationship is so remote that she is not personally liable out of her separate property for the community debts. See *Succession of Clark*, 27 La. Ann. 269; *Winter v. Gani*, 199 So. 600.

Upon the death of the wife the husband retains the property and continues to be the agent of the community to pay the debts. *Kremer v. Kremer*, 121 La. 484, 46 So. 600.

The revenues of the community property go to the husband and the wife cannot claim them as such, but can claim from her husband only the necessaries of life (Revised Civil Code 120. (Appendix C).

Of all the elements which make up that bundle of rights and privileges called ownership, very likely the most important is the right of dominion—the right to alienate and control and that is what the wife in Louisiana gets by the death of her husband. Death is the liberating event to the wife. For the first time she has title to her property in the sense that she is capable of conveying it, mortgaging it, or making a donation *inter vivos*. For the first time she can take the revenues of her property; for the first time in any real sense she can call it her own.

DECISION BELOW.

The Court below misconstrued *Tyler v. United States*, supra. The basis of the decision in the *Tyler* case is the following language of the Court:

> "Before the death of the husband (to take the Tyler Case, No. 428) the wife had the right to possess and use the whole property, but so, also, had her husband; she could not dispose of the property except with her husband's concurrence; but her rights were hedged about at all points by the equal rights of her husband. At his death, however, and because of it, she for the first time, became entitled to exclusive possession, use and enjoyment; she ceased to hold the property subject to qualifications imposed by the law relating to tenancy by the entirety, and became entitled to hold and enjoy it absolutely as her own; and then, and then only, she acquired the power, not theretofore possessed, of disposing of the property by an exercise of her sole will."

The Court below concluded that the *Tyler* decision was based in part upon the amiable fiction of the common law that the husband and wife were one and that each

owned every part and the whole, but the Court specifically rejected this in these words:

> "This view, when applied to a taxing act, seems quite unsubstantial."

The Court further sought to distinguish the cases upon the conclusion that in the *Tyler* case the Court was moved to its decision by a consideration of the fact that no part of the property originally belonged to the wife. However, the Court considered that feature only for the purpose of showing that the case was not excepted by these words of the statute:

> "Except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent."

This exception is comparable to the exceptions in the act under consideration here which excludes from the estate such part as is attributable to the separate estate of the surviving spouse or compensation for personal services to the surviving spouse, etc.

In discussing the case of *United States v. Jacobs*, supra, the Court below repeated the same error that it made in its estimate of the *Tyler* case in that it assumed that the pivotal reasons for the decision were this fictional unity of husband and wife and the fact that the surviving tenant did not contribute towards the creation of the joint tenancy. That the fiction of unity of husband and wife was not the basis of the decision, but was expressly rejected is this language of the Court in the *Jacobs* case, 306 U. S. 369:

> "The constitutionality of an exercise of the taxing power of Congress is not to be determined by such

> shadowy and intricate distinctions of common law property concepts and ancient fictions."

Moreover, it is apparent that the Court in referring to the circumstance that the surviving tenant contributed nothing was to show that the Government was not concluded by the statutory exceptions to this effect. The deciding reasons for the Court's opinion in the *Jacobs* case is this language:

> "Upon the death of her co-tenant, she for the first time, becomes possessed of the sole right to sell the entire property without risk of loss, which might have resulted from partition or separate sale of her interest while the decedent lived. There was—at his death—a distinct shifting of economic interest, a decided change for the survivor's benefit."

The words immediately above quoted are accurately appropriate to a description of the change in the Louisiana wife's interest as to her community moiety occurring at the death of her husband. In fact, a joint tenancy, as it existed in Illinois (See 96 F. 2d. 784, where this feature of the *Jacobs* case was discussed at length) could be terminated by each tenant by partition or by outright sale. Each had a right to mortgage it, or subject it to a lien; each had a right directly to take the fruits. In Louisiana, all of these important incidents to ownership are denied to the wife as to any part of the community property. The only advantage which the wife has in the community property in Louisiana over the right of the tenant in a joint tenancy in Illinois is that the wife in Louisiana has the right of testamentary disposition, but this is more than compensated for by the fact that other and probably more important advantages of ownership are denied to her.

The mere fact that the wife in Louisiana has a present vested interest should not cloak her interest from subjection to the Federal Estate Tax. It is manifest that in the tenancy dealt with in the *Jacobs* case, each tenant had a present vested interest of much more immediate consequence than does the wife in Louisiana.

BENDER v. PFAFF NO BAR.

Bender v. Pfaff, supra, should not be a bar here. In that case the Court was concerned merely with construction of an Act of Congress and there was involved no question as to the power of Congress. The Power of Congress to include the community, if it desired, is entirely left open by that case. This is apparent from the following language of this Court, in the case of *Poe v. Seaborn*, 282 U. S. 101, 75 L. Ed. 239 (dealing with community property income from the State of Washington, as *Bender v. Pfaff* dealt with it from Louisiana):

> "The case requires us to construe Sec. 210 (a) and 211 (a) of the Revenue Act of 1926 and apply them, as construed, to the interests of husband and wife in community property under the law of Washington. These sections lay a tax upon the net income of every individual. The act goes no farther, and *furnishes no other standard or definition* of what constitutes an individual's income. The use of the word 'of' denotes ownership. It would be a strained construction, which, in the absence of *further definition by Congress, should impute a broader significance to the phrase.*" (Italics ours).

Nor should the fact that the husband has only a restricted interest in the wife's share of the community

militate against its taxability. The wife can claim her share of the community property prior to death in the infrequent case where the disorder in the husband's affairs is such that her property rights are jeopardized (Revised Civil Code 2425); and when she obtains a separation *a mensa et thoro* or divorce. Rights of equal or more substance than these did not prevent the incidence of the tax in *U. S. v. Jacobs*, supra, where each tenant prior to death could of his own volition partition the res of the tenancy and sell or mortgage his interest and could possess and enjoy directly the fruits of his share of the tenancy.

LOUISIANA COMMUNITY NOT COMMERCIAL PARTNERSHIP.

The Court below broadly assimilated the Louisiana community to a commercial partnership and inferred therefrom that it would be as capricious to tax to the decedent's estate the interest of the surviving spouse, as it would be to tax to the surviving partner the decedent partner's interest in the partnership. There are similarities, of course, between the Louisiana community and a partnership, but the fact of similarities could not alone make it such. As well say that joint tenancies and tenancies by the entirety, taxable under the law, are partnerships because they have many of the indicia of ordinary partnerships. They are alike in joint ownership of the res and the income therefrom—joint possession and right of management and joint obligation for losses; in fact, differing from the ordinary partnership substantially, only in the fact of survivorship. These similarities to partnership did not gain freedom from the subjection to the Federal Estate Tax.

Mere badges and words may prove deceptive and do not conclude the Congress in its taxing power. Congress is permitted to look through definitions and find the realities for itself. Said this Court in *Tyler v. United States*, at 201 U. S. 502:

> "But mere names and definitions, however important as aids to understanding, do not conclude the lawmaker, who is free to ignore them and adopt his own. Karnuth vs. United States, 279 U. S. 231, 242, 73 L. ed. 677, 682, 49 Sup. Ct. Rep. 274."

The laws relating to partnerships in Louisiana are segregated from the laws relating to successions, and inheritances and are embraced in Articles 2801 to 2890, inclusive of the Revised Civil Code of Louisiana (See Appendix D for pertinent excerpts). The decision below could not mean that the community of acquets and gains existing between husband and wife in Louisiana is a mere commercial partnership, because Louisiana Revised Civil Code, No. 2807, reads:

> "MARRIAGE—COMMUNITY PROPERTY—NO PARTNERSHIP.—The community of property, created by marriage is not a partnership; it is the effect of a contract governed by rules prescribed for that purpose in this Code."

See *Succession of Boyer*, 36 La. Ann. 506; *Baird v. Lemee*, 23 La. Ann. 424; *Mackenroth v. Pelke*, 171 La. 842, 132 So. 365.

The Louisiana community has many distinguishing features from partnerships. A partnership is defined as a commutative contract between two or more persons looking to profit (Revised Civil Code 2801, Appendix D), whereas the community property is a creature of law ordained as an

incident to the marriage relation. Unlike partnership, there is no equality of right in management; the husband can make a gratuitous donation of part of the res of the community, the movable property, and most importantly the wife has no obligation for the community debts. The community cannot be dissolved at the mere will of either party, but is dissolved only as the law directs. Bankruptcy or interdiction of either party does not dissolve it, as it does a partnership (Revised Rivil Code 2876, Appendix D). Donations made to husband and wife jointly become by law part of the community assets (Revised Civil Code 2402, Appendix E), contrary to ordinary partnerships. All income and revenues of the separate property of the husband administered by him belong to the community (*Peters v. Klein*, 161 La. 664). All income and revenues of the separate and paraphernal property of the wife administered by the husband belong to the community (*Falconer v. Falconer*, 167 La. 595, 120 So. 19).

If analogies are to be indulged in, a near approach to the wife's interest in the Louisiana community is the dower provision in the common law states. The dower interest of the wife and the community interest of the wife in Louisiana are alike in that they measure the wife's participation in property controlled by the husband at death. The dower interests were made taxable in 1926 (26 U. S. C. A., Section 811 (b)). This dower provision has been held constitutional, see *Allen v. Henggeler*, 32 F. 2d. 69, a case coming from Nebraska. It is interesting to note that in Nebraska the wife's dower interest was vested and present. The Court described it thus:

> "The husband is, in effect, the managing agent and has control of the property. He can sell and dispose

> of it, or he may exchange it for other property. But at his death her interest therein comes to her in her own right. It does not pass to her by will, or by the intestate laws of the state. The husband cannot deprive her of that right. Gaster v. Estate of Gaster, 92 Neb. 6 (137 N. W. 900)."

How appropriate that language would be in describing the interest of the wife in the community in Louisiana!

IS THE ACT ARBITRARY AND CAPRICIOUS?

It certainly cannot be arbitrary and capricious in the generality of its application because a prime reason of Congress, aside from a desire to get revenue, was to neutralize advantages inherent in the community property systems. The Committee of the Senate in favorably reporting this section said in reference to it (see S. Report 1631, 77th Cong. 2d. Session, page 231):

> "This section, which corresponds to section 402 of the bill passed by the House, *eliminates special estate tax privileges enjoyed by virtue of the community property system.*" (Italics ours).

It could not be arbitrary and capricious as applied to these legatees because they do not claim that their mother (under the exceptions in the act) contributed to this estate through compensation for her personal services or income from such a fund or by virtue of her separate estate. Obviously, this is the average case, where, upon marriage the wife goes into the home and the husband into business, in which case the accumulations are more immediately due to the husband's exertions than the wife's. If the wife did not go in the home and did not go on salary, but to the contrary, into a business separate from her hus-

band, her earnings therefrom would have been her separate property (Revised Civil Code, Article 2334, Appendix F).

FOURTEENTH AMENDMENT.

The case of *Moffitt v. Kelly*, 218 U. S. 400, 54 L. Ed. 1086, sets at naught the contention that Act 119 of 1932 of the Louisiana Legislature violates the 14th Amendment to the Federal Constitution. In this connection, it is to be observed that the said act of the Louisiana Legislature is not claimed to be infirm by the yard stick of the State Constitution, the legatees relying in this respect on the 14th Amendment to the Federal Constitution.

In the *Moffitt v. Kelly* case the Court said in part, 218 U. S. 404:

> "* * * it was, nevertheless, within the power of the State, without violating the Constitution of the United States, in selecting objects of taxation, to select the vesting in complete possession and enjoyment by wives of their shares in community property consequent upon the death of their husbands, and the resulting cessation of their power to control the same and enjoy the fruits thereof. * * *"

Respectfully submitted,

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Counsel for Appellant.

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Of Counsel.

APPENDIX A.

Tit. 26 U. S. C. A., Sec. 813 (b) Estate, succession, legacy, and inheritance taxes. The tax imposed by section 810 or 860 shall be credited with the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or Territory or the District of Columbia, or any possession of the United States, in respect of any property included in the gross estate (not including any such taxes paid with respect to the estate of a person other than the decedent). The credit allowed by this subsection shall not exceed 80 per centum of the tax imposed by section 810 or 860 (before deducting from such tax the credits provided by section 813 (a) (1) and (2), and shall include only such taxes as were actually paid and credit therefor claimed within four years after the filing of the return required by section 821 or 864, except that—

(1) If a petition for redetermination of a deficiency has been filed with the Board of Tax Appeals within the time prescribed in section 871, then within such four-year period or before the expiration of 60 days after the decision of the Board becomes final.

(2) If, under section 822 (a) (2) or section 871 (a), an extension of time has been granted for payment of the tax shown on the return or of a deficiency, then within such four-year period or before the date of the expiration of the period of the extension.

Refund based on the credit may (despite the provisions of sections 910 to 912, inclusive), be made if claim therefor is filed within the period above provided. Any such re-

fund shall be made without interest. As amended Mar. 17, 1941, c. 21, Sec. 1, 55 Stat. 45; Oct. 21, 1942, 4:30 p. m., E. W. T., c. 619, Title IV, Sec. 410, 56 Stat. ... .

APPENDIX B.

Sec. 4 of Act 119 of 1932, Dart's La. General Statutes, Sec. 8584. Intent and purpose of act.—It is hereby declared to be the intent and purpose of this act to obtain for this state the benefit of the credit allowed under the provisions of Title III, section three hundred and one, subsection (b), of the Federal Revenue Act of nineteen hundred twenty-six to the extent that this state may be entitled by the provisions of said act, by imposing additional taxes, and the same shall be liberally construed to effect this purpose.

APPENDIX C.

Revised Civil Code No. 120. HUSBAND AND WIFE—RECIPROCAL DUTIES.—The wife is bound to live with her husband to follow him wherever he chooses to reside; the husband is obliged to receive her and to furnish her with whatever is required for the convenience of life, in proportion to his means and condition.

APPENDIX D.

Revised Civil Code No. 2801. DEFINITION.—Partnership is a synallagmatic and commutative contract made between two or more persons for the mutual participation in the profits which may accrue from property, credit,

skill, or industry, furnished in determined proportions by the parties.

Revised Civil Code 2876. TERMINATION—METHODS AND CAUSES.—A partnership ends:

1. —
2. —
3. By the death of one of the partners, or by his interdiction.
4. By his bankruptcy.
5. —

APPENDIX E.

Revised Civil Code 2402. PROPERTY FORMING COMMUNITY—PERSONAL INJURIES TO WIFE.—This partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estate which they may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two and not of both, because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase. But damages resulting from personal injuries to the wife shall not form part of this community, but shall always be and remain the separate property of the wife and recoverable by herself alone; "provided where the injuries sustained by the wife result in her death, the right to recover damages shall be as now provided for by existing laws."

APPENDIX F.

Revised Civil Code 2334. SEPARATE AND COMMON PROPERTY OF SPOUSES.—The property of married persons is divided into separate and common property.

Separate property is that which either party brings into the marriage, or acquires during the marriage with separate funds, or by inheritance, or by donation made to him or her particularly.

The earnings of the wife when living separate and apart from her husband although not separated by judgment of court, her earnings when carrying on a business, trade, occupation or industry separate from her husband, actions for damages resulting from offenses and quasi offenses and the property purchased with all funds thus derived, are her separate property.

Actions for damages resulting from offenses and quasi offenses suffered by the husband, living separate and apart from his wife, by reason of fault on her part, sufficient for separation or divorce shall be his separate property.

Common property is that which is acquired by the husband and wife during marriage, in any manner different from that above declared. But when the title to community property stands in the name of the wife, it cannot be mortgaged or sold by the husband without her written authority or consent.

FILE COPY

JAN 27 1944
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 252

J. HOWELL FLOURNOY, SHERIFF AND EX-OFFICIO TAX COLLECTOR,

Appellant.

versus

SAMUEL G. WIENER, WILLIAM B. WIENER AND JACQUES L. WIENER,

Appellees.

SUPPLEMENTAL BRIEF FOR APPELLANT.

EUGENE STANLEY,
Attorney General;
HARRY V. BOOTH,
LEONARD L. LOCKARD,
Counsel for Appellant.

BOOTH & LOCKARD,
Of Counsel.

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Appellees.

SUPPLEMENTAL BRIEF FOR APPELLANT.

New arguments or variations of old arguments have been tendered in Appellee's brief—hence, this supplemental brief on our behalf.

APPELLEES' MAIN CASES.

Appellees rely in the main on *Nichols v. Coolidge*, 274 U. S. 531, and *Hoeper v. Tax Commission*, 284 U. S. 206. In our opinion, these cases are not apposite.

In the *Hoeper* case, the Court had before it an income tax of the State of Wisconsin, which required a joint return by husband and wife, regardless of the origin or

source of the income. The wife in the case had separate property in which the husband had no interest. Said the Court:

> "He never had any title to it or control of any part of it."

There is far distance from the situation in Louisiana as relates to the community property. The husband in Louisiana has not only title, but he has control. In Wisconsin, this separate property of his wife was as remote from the husband as if it belonged to a total stranger.

In the case of *Nichols v. Coolidge*, the grantor had made an absolute deed to his children, reserving the property to himself under a rental arrangement. The grantees had an absolute right at any time to terminate this rental arrangement. The grantor had no reserved right paramount to the will of the grantees. Said the Court, speaking of the grantees:

> "They had a right to sell the property subject to the lease and had all rights incident to ownership."

The Court could have added that they had a right to terminate the lease.

As defined by the *Tyler* and *Jacobs* cases and the laws of Louisiana, we have undertaken hereinbelow to graph in juxtaposition the relative rights of the tenant by the entirety and of joint tenancy as to their interest in the tenancies prior to death as compared with the rights and interest of the wife in community property in Louisiana prior to death. This graph does not purport to be

inclusive of all the distinctions but serves to illustrate broadly the point over which we labor.

Right of Tenant by entirety in property prior to death	Right of Joint tenant in property prior to death	Right of wife in community property prior to death
Title? Yes	Title? Yes	Title? No
Possession? Yes	Possession? Yes	Possession? No
Fruits? Yes	Fruits? Yes	Fruits? No
Alienation? No	Alienation? Yes	Alienation? No
Conservation? Yes	Conservation? Yes	Conservation? Yes—Limited
Testamentary Disposition? No	Testamentary Disposition? No	Testamentary Disposition? Yes

It will thus be seen that of all of these six mentioned privileges connected with ownership, in the case of a tenant by the entirety, death creates only two rights—namely, the right to alienate and the right of testamentary disposition; that in the case of a joint tenant, death creates only one right—namely, the right of testamentary disposition; and that in the case of the wife in Louisiana, death creates four rights—namely, title, possession, fruits and the right to alienate.

IS THE WIFE'S ONE-HALF SUBJECT TO THE PAYMENT OF THE TAX?

Counsel for Appellees inveigh against the Act on the grounds that while it draws the wife's moiety into the taxable estate for the purpose of assessing the tax, such portion is not in the estate for the purpose of paying the tax. Is this position tenable?

It is the intent of the Act that the tax shall be paid before the distribution of the estate. It is made the duty

of the Executor throughout the Act to ascertain the tax and he is made personally liable therefor. (26 U. S. C. A., Section 825). In Louisiana the wife's share of community property is taken possession of and administered with the other property of the husband's in the husband's succession. (*Succession of Bertrand*, 123 La. 784, 49 So. 524; *Kremer v. Kremer*, 121 La. 484, 46 So. 600; *Fontenot v. Fontenot*, 157 La. 511, 102 So. 590; *Kelly v. Kelly*, 198 La. 338, 3 So. 2nd, 641). So in this case had there been an administration, the embattled wife's share would have been taken by decedent's executor and administered because the wife's interest in community property is residual only.

The Act contemplates payment by the Executor out of property in his hands, and the wife's property is in the hands of the Executor where there is an administration.

But the counsel contends that the Executor would not be permitted to pay it out of the wife's one-half. But by what law would he be prohibited? He is directed by Federal law to pay it out of funds in his possession and therefore, if he is denied making such disposition of the wife's property it is by virtue of state law and so the Federal Act has not fathered any injustice, if injustice it be.

In the case of *Riggs v. Del Drago* (October Term, 1943), this Court held that the Federal Act is not concerned with the ultimate thrust of the Federal Estate Tax and does not undertake to designate the persons who will finally bear the impact of the tax. This is a matter of local law. So if the matter eventuates, as appellees urge,

they have been victimized by State law, not the Federal law.

Moreover, Section 827 (b), Title 26, U. S. C. A. imposes personal liability for the tax on the spouse to the extent of property taken by her, but the counsel seeks to get around this provision of the law, by the argument that Section 826 (b) requires a return to the spouse who might be called on to pay this tax. That provision is inserted to provide for the situation where the estate is distributed before payment of the tax and the tax is taken from one distributee or more. In this case, the distributee making payment can enforce contribution from the others. See *Riggs v. Del Drago, supra*, for a discussion of this section.

It is true that Section 826 (a), Title 26, U. S. C. A. provides that proceedings can be taken in the event the tax is not paid against "property of the decedent", but this means property of the decedent as found by the Federal law. Under the Federal Tax law the estate of the decedent for taxable purposes, includes the community property held by him with the surviving spouse.

IS THE ACT APPLICABLE IF THE WIFE PREDECEASES THE HUSBAND?

Complaint is made that the Act manifestly cannot constitutionally stand in the event that the wife predeceases the husband. This happens two out of seven times in the United States.(1) This contention comes too late. It was not raised in the pleadings below. Certainly, grave constitutional questions should not be determined

(1) Fifteenth Census of the United States, Population, Vol. 2, p. 849, showing for 1930, 613,842 widows to 195,860 widowers among the white population.

except where the issue is squarely raised in the pleadings and the Court has benefit of full argument upon both sides. See *Mo. Pac. R. Co. v. Norwood*, 283 U. S. 247, 75 L. Ed. 1010, where the Court said (Page 254):

> "The burden is on the plaintiff by candid and direct allegations to set forth in its complaint facts sufficient plainly to show the asserted invalidity". (Citing cases).

As we have said, there is nothing in the pleadings suggesting it, nor was it mentioned in argument or otherwise. So far as the appellant is concerned, they are compelled to meet this issue raised for the first time in the brief of the Appellees in the Supreme Court of the United States. The Appellant has had no chance to develop this issue. Even if it should be assumed as to the wife, the Act could have no application, the Court would then be confronted with the question as to whether or not the Act is severable.

Moreover, all of this is aside from the consideration that the unconstitutional application of the Act, not as it might apply to others, but as it applies to the complaining party, is before the Court in a given case.

We refrain from going into these questions in the confident belief that Appellees are attempting to present another case which is not before this Court and to espouse causes not their own and attempting this for the first time in their brief before the Supreme Court of the United States. The manifest injustice of calling upon the Appellant to confront that issue under these circumstances is clear.

UNIFORMITY.

The Succession complains that Section 8 of Article 1 of the United States Constitution is violated in that there is no geographic uniformity in the application of this late provision relating to inclusion of community property. The point is made that there are only eight community states and that the statute will bear onerously on those eight states and leave forty others unaffected. However, the community system is one which the State of Louisiana is at liberty to have or not to have. If the Federal Statutes were made to depend upon the state statutes, this would operate as a restriction on the Federal Government and a denial of the declaration in the Federal Constitution that the Constitution, Laws and Treaties of the United States are the supreme law of the land *(Article VI, U. S. Constitution)*.

This issue, in another form, was presented to the United States Supreme Court in the case of *State of Florida v. Mellon*, 273 U. S. 11, 71 L. Ed. 511. The State of Florida had no inheritance tax for the obvious reason that its absence would attract aging, monied people to take up residence in that state (it being a public policy of Florida not to have an inheritance tax as it is the public policy of Louisiana to have a community property system). Florida sought to enjoin the provision of the Federal Revenue Act of 1926, Sec. 301 (b) providing for a credit of 80% in the payment of the Federal Estate Tax, of all inheritance and legacy taxes paid by a decedent's succession to the various states. The discrimination Florida urged was that thus, in the payment of their Federal Estate Taxes, citizens of all the states having an inheritance tax enjoyed a credit

against their Federal Estate Tax not enjoyed by the citizens of Florida and it therefore urged the lack of geographic uniformity as is urged here, but the Court struck this down in the following language which is appropriate here:

> "The contention that the federal tax is not uniform because other states impose inheritance taxes while Florida does not, is without merit. Congress cannot accommodate its legislation to the conflicting or dissimilar laws of the several states nor control the diverse conditions to be found in the various states which necessarily work unlike results from the enforcement of the same tax. All that the Constitution (art. 1, sec. 8, cl. 1) requires is that the law shall be uniform in the sense that by its provisions the rule of liability shall be alike in all parts of the United States."

A tax is uniform, within the meaning of this constitutional provision on that subject, when it operates with the same effect in all places where the subject is found; and it is not wanting in such uniformity because the thing taxed is not equally distributed in all parts of the United States.

Edye v. Robertson (Head money cases), *112 U. S. 580, 28 L. Ed. 798;*
Pollock v. Farmers' Loan & T. Co., 157 U. S. 593, 39 L. Ed. 823;
Pollock v. Farmers' Loan & T. Co., 158 U. S. 683, 39 L. Ed. 1145;
Knowlton v. Moore, 178 U. S. 86, 44 L. Ed. 987;
Downes v. Bidwell, 182 U. S. 452, 45 L. Ed. 1131;
Patton v. Brady, 184 U. S. 622, 46 L. Ed. 720.
Phillips v. Commissioner of Internal Revenue, 283 U. S. 588, 75 L. Ed. 1289.

But counsel says that the community in Louisiana is a kind of co-tenancy. There is, of course, an analogy to a co-tenancy as there is an analogy to a partnership, but the distinction is so obvious as to allow Congress in its discretion to make one taxable and the other not. There must be a margin allowed for the play of legislative judgment. *Burnet v. Wells*, 289 U. S. 669, 77 L. Ed. 1439.

Respectfully submitted.

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Appellant,

versus

SAMUEL G. WIENER, WILLIAM B. WIENER AND JACQUES L. WIENER,

Appellees.

Appeal from the Supreme Court of the State of Louisiana.

ORIGINAL BRIEF IN BEHALF OF APPELLEES.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 252

J. HOWELL FLOURNOY, SHERIFF AND EX-OFFICIO TAX COLLECTOR,

Appellant,

versus

SAMUEL G. WIENER, WILLIAM B. WIENER AND JACQUES L. WIENER,

Appellees.

Appeal from the Supreme Court of the State of Louisiana.

ORIGINAL BRIEF IN BEHALF OF APPELLEES.

The decision of the Court below (R. 19) is reported in 14 South. (2d) 475.

The case presents the question of the constitutional validity of Section 402(b)(2) of the Federal Revenue Act of 1942. The trial court (R. 13) held the statute to be violative of the Fifth Amendment, and of Section 8 of Article I of the Federal Constitution. The Supreme Court of the State affirmed, holding that the Fifth Amendment

rendered the statutory provision null. The Attorney General of the United States(1), having suggested in oral argument below that the question before the Court was the constitutionality of the State's action rather than that of Congress, the Supreme Court answered (R. 22) that if the Attorney General were correct, then that such construction of the State statute would in itself cause it to be violative of the Fourteenth Amendment(2). Thus the case is properly here on direct appeal (28 U. S. C. § 344(a)), because the issues draw in question the validity of a statute of the United States and the decision below was against its validity. If, however, the contention of the Attorney General below were correct, the case is reviewable by certiorari (28 U. S. C. § 344(b)), and such review would be had "under the papers whereon the appeal was allowed" (28 U. S. C. § 344(c)).

SUMMARY STATEMENT OF THE CASE.

The case was tried on a stipulation which reveals:

Sam Wiener, Jr., a citizen of Louisiana, was married in Louisiana in 1907. He died on December 10, 1942: all assets in which he had any interest being community property. Under the law of Louisiana, he and his intended wife had been entirely free (Louisiana Civil Code, Article 2325) to make any kind of agreement they might see fit with respect to their future property relations; to make any modification or limitation to what otherwise would be the ordinary community regime (Article 2332);

(1) The Attorney General appeared in the case upon invitation of the Court, pursuant to joint motion of the parties. See R. 16.
(2) This ruling was responsive to the pleadings. See alternative plea of unconstitutionality. (R. 17).

or even, (Article 2392) to provide that there should be "no partnership between them". Having elected to make no such antenuptial agreement, the local law presumed, as an incident to the civil contract of marriage (Civil Code, Article 86), the creation of a "partnership or community of acquets or gains", which

> "consists * * * of the products of the reciprocal industry and labor of both husband and wife".
> *Civil Code, Article 2399.*

It is the settled law of Louisiana as stated by the Supreme Court of the State (R. 22) that such community is a co-ownership

> "in which the husband and wife own equal shares, their title thereto vesting at the very instant such property is acquired".

The authorities to this effect are fully displayed in the opinion of the court below, which opinion necessarily is determinative here as to the local law.(1) That such is the law of Louisiana was held by this Court in *Bender v. Pfaff, 282 U. S. 127*, affirming *38 Fed. (2d) 642*.

See also

Poe v. Seaborn, 282 U. S. 101;
Goodell v. Koch, 282 U. S. 118;
Hopkins v. Bacon, 282 U. S. 122;
Warburton v. White, 176 U. S. 484;
Arnett v. Reade, 220 U. S. 311.

Mr. Wiener died testate, leaving his entire estate to his three children, who are the appellees here. Such

(1) Knights of Pythias v. Meyer, 265 U. S. 30, 32; Georgia Railroad & Electric Co. v. Decatur, 295 U. S. 165, 170; Blair v. Commissioner, 300 U. S. 5, 10 (and cases cited).

"entire estate", under the local law, consisted of his undivided one-half interest in the community property. That was all that he could dispose of, or that his universal legatees could receive: this, because all that Mr. Wiener owned under the local law—and hence all that he could dispose of—was his interest in the community, namely an undivided one-half interest.

HOW THE ISSUE ARISES.

This case originated in an action instituted by the appellees against the State Tax Collector under the provisions of Act 127 of the Extra Session of the Louisiana Legislature of 1921, which provides for a summary proceeding

> "by rule before the Court which has jurisdiction of the succession to fix the amount of tax due by each heir or legatee".

To this rule, the Tax Collector answered that the inheritance tax was due

> "on the entire community estate, rather than upon the one-half interest in the community inherited" (R. 8)

and pleaded that the inheritance tax due to the State of Louisiana was to be measured, not by what Mr. Wiener owned and transmitted to his heirs, but by the value of the entire community, in which his ownership was never more than an undivided one-half(1). He properly contends that,

(1) The stipulation reveals (R. 12; see also opinion below, R. 20) that under the contention of the appellant, the tax due to the State of Louisiana is $14,330.90, whereas, under appellee's contention, approved by the court below, such tax amounts to $8,224.09.

by an amendment to the State inheritance tax law (Act 119 of 1932, see Appendix, page 51), the inheritance tax due to the State must be in a sum equal to eighty percent of the amount of the Estate Tax exigible by the Federal Government under the Revenue Act of 1926 (44 Stat. 69; Title 26, § 410, United States Code). This, it is conceded, is the plain provision of the State statute.

But the Tax Collector goes further. He says that Section 402(b)(2), amending paragraph 811(e) of Title 26 of the United States Code, requires the inclusion in the estate of the decedent of the value at the time of his death, not merely of that which passed to his heirs under the State law, but the entirety of that property owned jointly and equally by the decedent and his surviving spouse under the law of the State of Louisiana: hence, that the State inheritance tax which must be eighty percent of the Federal tax, must be computed upon the inclusion in the taxable estate of the entire community. Thus, his contention is, of course, that, both as to valuation and as to graduated rates, the computation must be not only upon that which had been owned by the decedent and transmitted by his death, but in addition, upon the value of what had always been owned by the survivor.

Since the State statute plainly requires the exaction of a tax equal to eighty percent of the Federal tax referred to, if such Federal tax is to be based upon the inclusion in the husband's estate of the value of the entire community, the position of the Tax Collector would be correct. If, however, the Federal taxing authorities may

not base the Federal tax upon the valuation of the property owned by Mr. Wiener before his death in common with his surviving spouse, the Tax Collector is wrong.

And since the Federal statute does specifically require such inclusion, the Tax Collector is right, if the statute have legal validity. Equally clear it is that, if the statute be not valid, the appellant is wrong. The statute, of course, is valid unless it be unconstitutional. If it be unconstitutional, it simply never existed, and afforded no warrant for the appellant's contention. Appellees pleaded in the trial court that the statutory provision is violative of the due process clause of the Fifth Amendment, and of the geographical uniformity clause of Section 8 of Article I of the Federal Constitution (R. 9). The District Court sustained the plea of unconstitutionality upon both grounds (R. 13). On appeal, appellees filed an "amended and alternative plea of unconstitutionality", upon the ground that, if the action of the taxing authorities should be considered based upon the State statute, such action would contravene the due process clause of the Fourteenth Amendment (R. 17). The Supreme Court of the State (R. 25) held that the statute violated the Fifth Amendment. It also held that, if the question should be considered as arising out of State statutory authority, the contention of the Tax Collector would be violative of the Fourteenth Amendment (R. 22).(1)

(1) Thus the case could not possibly have been decided below without decision of the Federal ground. See **Abie State Bank v. Bryan, 282 U. S. 765, 773,** and cases cited.

SUMMARY OF ARGUMENT.

As is clearly pointed out in the opinion below (R. 27) the ownership of the wife in Louisiana of an undivided one-half interest in all of the assets of the community is vested and complete. This title, moreover, is not a gratuitous one, but is one actually earned by the wife, since the law presumes all acquisitions to be the result of the joint efforts of the two spouses. (See also *19 La. Ann. 14, Succession of Costa*). Hence, not only does a wife acquire no ownership by her husband's death, but she has never been the recipient of any form of gratuity. In the eyes of the local law, she acquired the property jointly with her husband in virtue of their marital contract. The option of the intended spouses, under the Civil Code (Article 2325) to provide by antenuptial contract any form of modification of the community (Article 2424), or even to provide that there should be no community (Article 2392), or that the community should be managed jointly by husband and wife, or even by the wife alone (Article 2332), carries with it the conclusive presumption that, by failing to exercise such option, they had elected that future acquisitions should be under the regime of the ordinary community which, says the C vil Code (Article 2399),

> "consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife * * *".

Of course, the decision of the State court, on a question of State law, relating to the tenure of property, is binding here; but it happens that this Court in *Bender v. Pfaff, 282 U. S. 127*, has already held that, under the

law of Louisiana, the wife's one-half interest in the community property is hers and not something she gets by her husband's death:

> "• • • each spouse may by will dispose of only his or her one-half of the community and is powerless to affect the other's half. In case of death intestate one half descends to the heirs of the decedent and the other spouse is powerless to prevent this.
>
> "While the husband is the manager of the affairs of the marital partnership, the limitations upon the wrongful exercise of his power over community property are more stringent than in many states which have a community system".

This Court, after pointing out the absolute right of the wife during the marriage to bring about the dissolution and liquidation of the community and an accounting from the husband for acts done in fraud of her rights, concluded:

> "the wife has a present vested interest in community property equal to that of her husband".

It being settled that the estate of the husband can comprehend no more than one-half of the community, the appellees contend that it is beyond the constitutional power of Congress to include in the husband's estate the one-half which had always belonged to the wife, and then to measure the tax upon his estate, as to amount and as to graduated rates, by double the value of that of which alone his death was the generating source of passage to his heirs.

Hoeper v. Tax Commission, 284 U. S. 206;
Knowlton v. Moore, 178 U. S. 41;
Nichols v. Coolidge, 274 U. S. 531;
Heiner v. Donnan, 285 U. S. 312.

With respect to the adverse contention that the wife is vested, for the first time, at the death of the husband, with the unlimited power of disposition of her half, the position of the appellees is—as will be later more fully developed—that the husband's power of management in no manner limits the present ownership of the wife but, on the contrary, is merely a managerial arrangement which she has called into being when, under the law of Louisiana, she had had the right to modify or even to do away with it entirely. In other words, the husband's death does not confer upon the wife anything of value: on the contrary, it deprives her of the services of her chosen agent. This Court has pointed out that in states other than Louisiana, where the husband might not legally be called into account by the wife, such power of management

> "by no means negatives the wife's present interest as a co-owner".
>
> *Poe v. Seaborn, 282 U. S. 101, 113.*

But in *Bender v. Pfaff*, decided on the same day as *Poe v. Seaborn*, this Court noted that in Louisiana the wife does have the power, legally, to call the husband to account, or even to obtain an immediate dissolution of and accounting for the community, in the event the husband prove an unfit manager (282 U. S. at page 132).

Moreover, as will be later pointed out, the inclusion in the husband's estate, even merely for the purpose of valuation, of property which had always belonged to his wife, and which consequently never passed to her at his death, may result—under the high brackets of the graduated rates existing—in a tax larger than the entire amount

of that which he had owned. Even in other cases, it would impose upon those who had inherited by his death, a tax based upon the value of property in which they have no interest, and of which his death was never the cause of transmission to anyone.

ARGUMENT.

I.

Since it is settled, as a matter of local law, that title to community property vests *eo instanti* at its acquisition equally in husband and wife, it would seem necessarily to follow that the proposition presented is no different than would be the attempt on the part of Congress to include in the estate of any tenant in common the value of the entire interest in all property in which he had co-owners.

Of course, it is fundamental that each state has the power to determine for itself the manner and conditions upon which property situated within its boundaries may be acquired, enjoyed and transferred.

Pennoyer v. Neff, 95 U. S. 714, 722.

It has always been considered inconceivable that the Federal Government has power to vary the law of descent in any state.

The Federalist, Number XXXI.

The inclusion, therefore, in the estate of the husband of property which he never owned, with the result of imposing upon his heirs a tax liability measured by the value of that which they acquired by his death, *plus* the

value of that which belonged to someone other than the decedent, would be directly inconsistent with the due process guaranteed by the Fifth Amendment, as interpreted by this Court.

In *Hoeper v. Tax Commission, 284 U. S. 206*, a Wisconsin statute required the filing of a joint return by husband and wife for state income taxes: the combined total of income of husband and wife being then taxed according to a graduated scale. The statute was attacked as violative of the Fourteenth Amendment. Reversing the decision of the Supreme Court of Wisconsin, 202 Wis. 493, 233 N. W. 100, which had sustained the constitutionality of the act upon the ground that the statute merely retained or reestablished what was formerly an incident of the marriage relation, this Court said:

> "The question presented is whether the state has power by an income-tax law to measure his (the husband's) tax, not by his own income, but, in part, by that of another. To the problem thus stated, what was said in Knowlton v. Moore, 178 U. S. 41, 77, is apposite:
>
> > 'It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems.' "

After thus referring to the observations in *Knowlton v. Moore*, the Court concluded:

> "We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the 14th Amendment. That which is not in fact the taxpayer's income cannot be made such by calling it income. (Compare Nichols v. Coolidge, 274 U. S, 531, 540."

In *Nichols v. Coolidge, 274 U. S. 531*, this Court expressly recognized the controlling effect of the Fifth Amendment upon the power of Congress in the levying of an inheritance tax. In that case, the Court held that so much of paragraph 402(c) of the Revenue Act of 1919 as required the inclusion in the gross estate of a decedent, for the purpose of estate taxation, of the value of property donated by the decedent prior to its passage, directed a taking of property without due process of law. The Court said:

> "We must conclude that §402(c) of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation."

Later, the statute stricken in *Nichols v. Coolidge*, was amended so as to provide merely that any transfer made within two years prior to the death of a decedent should be deemed to have been made in contemplation of

death and, therefore, was to be included in the estate for the purpose of measuring the estate tax. The constitutionality of this statute under the Fifth Amendment came before the Court in *Heiner v. Donnan, 285 U. S. 312*. Upon the express authority of the *Hoeper* case, the Court said:

> "The restraint imposed upon legislation by the due process clauses of the two amendments is the same. Coolidge v. Long, 282 U. S. 582, 596. That a federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process of law clause of the 5th Amendment is settled. Nichols v. Coolidge, 274 U. S. 531; Brushaber v. Union P. R. Co., 240 U. S. 1, 24, 25; Tyler v. United States, supra (281 U. S. p. 504)."

Then, after discussing the *Hoeper* case, the Court said:

> "In substance and effect, the situation presented in the Hoeper case is the same as that presented here. * * * *The result is that upon those who succeed to the decedent's estate there is imposed the burden of a tax, measured in part by property which comprises no portion of the estate, to which the estate is in no way related, and from which the estate derives no benefit of any description.* Plainly, this is to measure the tax on A's property by imputing to it in part the value of the property of B, a result which both the Schlesinger and Hoeper cases condemn as arbitrary and a denial of due process of law. *Such an exaction is not taxation but spoliation.* 'It is not taxation that government should take from one the profits and gains of another. That is taxation which compels one to pay for the support of the government from his own gains and of his own property'. United States v. Baltimore & O. R. Co., 17 Wall. 322, 326." (Italicizing ours).

II.

THE APPELLANT'S CONTENTION.

The gravamen of the contention of appellant is that this case is ruled by *Tyler v. United States, 281 U. S. 497,* and *United States v. Jacobs, 306 U. S. 363.*

As clearly pointed out by the State Supreme Court (R. 27), neither of these cases derogates in any manner from the contention accepted below.

A brief history of the statutes under which these cases were decided is appropriate.

The *Tyler* case arose under the Revenue Act of 1916 (39 Stat. at L. 756, 777, 778) where, for the first time, appeared the provision in the Internal Revenue Code (U. S. C. Title 26, § 811) and which is carried forward in the Revenue Act of 1942 in § 402(e)(1), requiring the inclusion in the value of the estate of the decedent:

> "To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: Provided, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the

value of such property as is proportionate to the consideration furnished by such other person: Provided further, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants."

The Court, page 505, after pointing out

"that a federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process clause of the 5th amendment",

said:

"To include in the gross estate, for the purpose of measuring the tax, the value of property, no part of which originally belonged to one spouse, but which came to the tenancy, mediately or immediately, as a pure gift from the other, and which, as a consequence of the latter's death, was relieved from restrictions imposed by the law in respect to tenancy by the entirety so as to produce in the survivor the right of sole proprietorship, is obviously neither arbitrary nor capricious. The evident and legitimate aim of Congress was to prevent an avoidance, in whole or in part, of the estate tax by this method of disposition during the lifetime of the spouse who owned the property, or whose separate funds had been used to procure it; and the provision under review is an adjunct of the general scheme of taxation of which it is a part, entirely appropriate as a means to that end. Taft v. Bowers, 278 U. S. 470."

Because of the peculiar technical nature of the tenure of tenancy by the entirety, wherein survivorship is of the essence, the Court moreover pointed out that, death being the generating source of the complete ownership devolving upon the survivor, it was a proper subject of taxation (page 501):

> "Death duties rest upon the principle that death is the 'generating source' from which the authority to impose such taxes takes its being' ".

Referring, then, to the complete ownership and dominion vesting in the survivor as the result of the death of the former co-tenant by the entirety, the Court said:

> "At his death, however, and because of it, she, for the first time, became entitled to exclusive possession, use and enjoyment; she ceased to hold the property subject to qualifications imposed by the law relative to tenancy by the entirety, and became entitled to hold and enjoy it absolutely as her own."

It is clear, therefore, that the *Tyler* case rests upon these bases:

1. That it is competent for Congress to derive revenue from any gratuitous alienation which otherwise would relieve either donor or donee from the ordinary form of death or estate taxes.(1) It was visceral to the statute, and to the decision, that the interest of the survivor thus included in the estate of the decedent, should be gratuitous. The case, therefore, rests upon the same doctrine which animates the decisions sustaining gift taxes; *i. e.*

(1) Stone, J., dissenting. Helvering v. St. Louis Union Trust Co., 296 U. S. 46.

the subjection to duties to the Federal revenue of property gratuitously acquired, and which, but for the gratuity, would have formed part of the donor's estate.

2. The peculiar tenure designated "tenancy by the entirety" eventually depends upon survivorship as the cause of the vesting of complete ownership in the survivor. Death of one of the tenants, therefore, is the cause of the vesting of such title. Before death, there is one tenure. After, and solely by reason of death, another tenure, *i. e.* complete ownership and dominion comes into existence. Such vesting of *title* was, therefore, held a proper subject of the taxing power.

In *United States v. Jacobs, 306 U. S. 363*, the decision dealt with two cases. In the first case, the husband had, with his own separate funds, purchased property jointly for himself and his wife as "joint tenants". In the second case, the surviving wife had, it is true, contributed a portion of the purchase price of the property bought in joint tenancy, but that contribution, in turn, had been simply a gift from the husband. In essence, therefore, the two cases were similar. Quoting from the *Tyler* case, as authority, the Court said:

"It is clear that Congress intended by § 302 of the 1924 Act, to include in the gross estate of a decedent the full value at death of all property owned by him and any other in joint tenancy or by the entirety—irrespective of the date of the tenancy's creation—insofar as the property or consideration therefor is traceable to the decedent."

Then, dealing with the argument advanced that a different legal situation was created by a "joint tenancy" than by a "tenancy by the entirety", the Court said:

> "Only a fiction stands between the two. Survivorship is the predominant and distinguishing feature of each. The 'grand incident' of joint estates is the doctrine of survivorship, by which, when two or more persons are seized of a joint estate * * * the entire tenancy upon the decease of any of them remains to the survivor. * * *
>
> "Upon the death of her co-tenant she for the first time became possessed of the sole right to sell the entire property without risk of loss which might have resulted from partition or separate sale of her interest while decedent lived. There was, at his death, a distinct shifting of economic interest, a decided change for the survivor's benefit. The termination of a joint tenancy marked by a change in the nature of ownership of property was designated by Congress as an appropriate occasion for the imposition of a tax."

It seems patent, then, that the *Jacobs* case decided nothing more than what had been decided in the *Tyler* case, *i. e.* that the constitutional power of Congress in the premises proceeded, (1) from its power to tax gratuities, (2) from its power to tax a change of ownership directly caused and generated by the death of another.

It is worthy of note from a history of the statutes, that Congress has never conceived that, even in the case of joint tenancies or tenancies in common, the principle contended for by appellant could prevail, in the absence of the element of gift. From the inception of the statutes construed in the *Tyler* and *Jacobs* cases, the gratuitous na-

ture of the survivor's acquisition of interest has been of the essence. Nowhere in the decisions of this Court may be found a statement that the entire property under either tenure could be included in the estate of the deceased tenant, except where the survivor's interest proceeded directly or indirectly from a gift.

Considering the nature of that joint ownership which grows out of the marital partnership in Louisiana, neither the *Tyler* nor the *Jacobs* case may serve as authority for sustaining the statute under attack, because the interest of the wife does not arise out of a gratuitous title. It is as much an onerous title as is the interest of the husband. The right of the parties by ante-nuptial agreement to provide that there shall be no community (Civil Code, Article 2392); to modify the future community in any manner they might see fit (Civil Code, Articles 2325, 2424, 2332) which, of course, presupposes that the management might have been vested in the wife alone; and the statutory declaration that the relation between husband and wife is a contractual one (Civil Code, Article 86): all serve to make plain the fact that the husband and wife, jointly (Civil Code, Article 2329), earn whatever the community acquires.(*)

The decision below (R. 27) clearly points out that whatever is acquired by the community is the

> "product of the reciprocal industry and labor of both husband and wife".

See, also, 19 La. Ann. 14, *Succession of Costa.*

(*) Even Article 2807 of the Civil Code (which is found, not under the rubric of "Community or Partnership of Acquets and Gains", but under that of "Partnership") emphasizes that the common ownership of the spouses in the marital community is of contractual origin.

In the eye of the law, the carrying out by the wife of her portion of the marital duties is the complete economic equivalent of the husband's exertions on the outside. Hence, as a matter of the public policy which governs the tenure of property, the basic civil law of the State decrees that all property acquired by either, by onerous title, is owned equally and jointly by each. With that principle, Congress may not interfere. Before the adoption of the Constitution, it was pointed out in *The Federalist*, No. 31:

> "Suppose, by some forced construction of its authority, (which indeed cannot easily be imagined,) the Foederal Legislature should attempt to vary the law of descent in any State; would it not be evident, that in making such an attempt, it had exceeded its jurisdiction, and infringed upon that of the State?"

We might well substitute "the law of ownership or tenure of property", and the principle would be identical. See observation of the Court in *Pennoyer v. Neff, 95 U. S. 714, 722.*

It, therefore, is clear that under the law of Louisiana, the wife's interest does not proceed from a gratuity, nor is it one whereof the husband's death is the "generating source". She owned her undivided one-half interest *ab initio*, and ownership vested in her by the same title and for the same consideration through which the husband's interest was acquired. As expressed by the Civil Code, Article 2402:

> "the period of time (i. e. during marriage) when the purchase is made is alone attended to, and not the person who made the purchase".

Apparently, in an attempt to bring the amendment of 1942 within the reasoning of the *Tyler* and the *Jacobs* cases, the writer of the statute inserted a provision seeking to except from the community property falling into the estate of a deceased spouse

> "such part thereof (i. e. of the community) as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse".

However this provision might fit into community laws of other states, we do not know. Certainly, it evinces an entire misconception of the law of Louisiana. For "compensation for personal services actually rendered" falls into the community (Civil Code, Article 2402) regardless of whether such services be rendered by the husband or by the wife, living together as such.(*)

Succession of Manning, 107 La. 456;
Gastauer v. Gastauer, 143 La. 749;
Hellberg v. Hyland, 168 La. 493;
Ford v. Brooks, 35 La. Ann. 157.

And where separate property of the surviving spouse has been used for the benefit of the community, that into which it has been converted is community property, leaving its former owner merely a creditor of the community at its dissolution:

"It is well settled that where the separate funds of one spouse have been invested in property for the

(*) Whatever argument appellant may make based upon Article 2334 of the Civil Code was rejected by the Supreme Court of the State in Houghton v. Hall, 177 La. 238.

community or otherwise properly expended for the benefit of the community, such spouse becomes a creditor of the community to that extent."

Succession of Merrick, 35 La. Ann. 296;
Gee v. Thompson, 41 La. Ann. 351;
Sharp v. Zeller, 110 La. 61 (72);
Succession of Watkins, 156 La. 1000, 1004;
Succession of Goll, 156 La. 916.

Thus, so far as Louisiana is concerned, the intended exception becomes meaningless. It is significant, however, as showing the thought of the author that the provision can be sustained only upon the principle that the wife's interest is a gratuitous one and its taxability thus governed by the *Tyler* and the *Jacobs* cases.

But it is argued that, inasmuch as the power vested in the husband during marriage as sole agent of the community necessarily comes to an end at his death, such death thus becomes the generating source of a valuable right to the wife which did not before exist. But in *Poe v. Seaborn, 282 U. S. 101, 112*, this Court repelled the argument that such right in the husband was an attribute of property. Repeating its previous holding in *Warburton v. White, 176 U. S. 494*, the Court pointed out:

"The obligations of the husband as agent of the community are no less real because the policy of the state limits the wife's right to call him to account in a court. Power is not synonymous with right. Nor is obligation coterminous with legal remedy. The law's investiture of the husband with broad powers by no means negatives the wife's present interest as a co-owner."

And when this Court came to the Louisiana case, *Bender v. Pfaff, 282 U. S. 127, 132*, it said:

> "While the husband is the manager of the affairs of the marital partnership, the limitations upon the wrongful exercise of his power over community property are more stringent than in many states which have a community system. In Louisiana, if the husband proves, by reason of financial difficulties or the like, an unfit manager, the wife may bring about an immediate dissolution and liquidation of the community property. Wolf v. Lowry, 10 La. Ann. 272; Webb v. Bell, 24 La. Ann. 75; Brown v. Smythe, 40 La. Ann. 325, 4 So. 300. And when the wife sues for a separation of the property she is entitled to an accounting from the husband for community income or property in his hands and to reimbursement and retribution for any act done by him in fraud of her rights. Hill v. Hill, 115 La. 489, 39 So. 503; White v. White, 159 La. 1065, 106 So. 567."

Thus, the exclusive agency of the husband for the community is no more a property right than is the power of the tutor (guardian) over the property of his ward, or that of a curator (committee) over the property of an interdict. The husband owns his one-half, the wife owns her half. He manages the joint property, because in the eye of the law, it is essential that that management be single and not divided. But, as pointed out in *Arnett v. Reade*, such power is subject to change by the legislature at any time. In Louisiana, as we have previously noted, it could have been done away with entirely by antenuptial contract; or, by the same species of agreement, the exclusive management could have been invested in the wife. Failure, whether by neglect or by intent, to do away with,

or to modify the community, or to substitute joint management, or management of the wife for that of the husband, was therefore the act of the parties. The wife here has, because she has not otherwise stipulated, herself conferred the exclusive power of management upon the husband during the existence of the community. That agency, moreover, as this Court pointed out in *Bender v. Pfaff*, is, like any other agency, charged with the duty of honest and prudent management; for the law of Louisiana gives to the wife an effective remedy against either imprudence or dishonesty which might cause pecuniary loss to her, or to the community.

Thus, the wife does not have to wait for death or divorce in order to take away from the husband the power of administration. Termination of the marital relation is not necessary in order to give the wife the right to dispose of the one-half which she already owned. If her rights are in danger, or if the husband prove an unfaithful or imprudent agent, she may terminate the agency. Thus, her position is not materially different from that of any partner where the articles of partnership provide for exclusive management by one. As long as the husband's management is prudent and honest, she has nothing to gain by divesting him of the agency; on the contrary, that would be to her injury. We are at a loss, therefore, to gather upon what theory it can be said that she secures an economic benefit by her husband's death. Of course, that event confers on her no property, for the one-half of the community had always belonged to her. She has merely lost the services of her chosen agent. If such loss could be the occasion of the exaction of a federal tax, so likewise could the termination of the

powers of the exclusive manager of a partnership, the coming of age of a minor, or the recovery of his reason by an insane person. In any of those cases, power of management and control comes into existence by the happening of an event in no whit legally different from that which is sought here to be made the occasion of an excise.

But counsel say that their position is sustained by *Moffitt v. Kelly, 218 U. S. 400.* There, the issue was the validity, under the Fourteenth Amendment, of an inheritance tax statute of California as applied to the assessment of a tax against the interest of a surviving widow in community property. At that time, the settled law of California was that the wife's interest in the community during its existence was "a mere expectancy" *(United States v. Robbins, 296 U. S. 315, 326)*, from which fact, of course, it is clear that, contrary to the doctrine in the other community states, the wife took from the husband by his death.

Subsequent legislation changed the status of the wife *quoad* her interest in the community, so that the federal inheritance tax (at least, prior to the statute here in question) no longer applied to include the wife's interest in the valuation of the husband's estate.

> *Wardell v. Blum (CCA 9th) 276 Fed. 226*, (certiorari denied *258 U. S. 618*).

And in the subsequent case of *United States v. Malcolm, 282 U. S. 792*, this Court recognized the controlling effect of the change in the local law of California, by applying to the incidence of the tax on community income

the doctrine of *Poe v. Seaborn* and *Bender v. Pfaff*. Thus, as said in *Coolidge v. Long, 282 U. S. 582, 601*, of *Moffitt v. Kelly:*

> "The state court sustained the tax upon the wife's share in the community property. This court held that the nature and character of her right was a local question and that the tax was not violative of the contract clause of the Constitution or the due process or equal protection clause of the 14th Amendment".

The Court then points out that this "local question" had been considered and decided by this Court in *United States v. Robbins* as being one that had been settled as a rule of property in California by its highest court for more than sixty years.

The local law of Louisiana was recognized by this Court in *Bender v. Pfaff* to have been settled that the wife's interest in community property is vested and equal to that of the husband. That principle is emphasized in the decision below, which conclusively states the local law so far as this Court is concerned.

Saltonstall v. Saltonstall, 276 U. S. 260, 270, and cases cited.

To measure the tax upon the husband's estate by the value of something which belonged to the wife or to any other co-owner would be squarely contrary to what this Court said in *Hoeper v. Tax Commissioner, 284 U. S. 206, 248*, and reaffirmed in *Heiner v. Donnan, 285 U. S. 312, 326:*

> "We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a State to measure the tax on one person's prop-

> erty or income by reference to the property or income of another is contrary to due process of law as guaranteed by the 14th Amendment."

And, we should add, equally as obnoxious to the same clause of the 5th Amendment.

Nichols v. Coolidge, 274 U. S. 531, 543;
Knowlton v. Moore, 178 U. S. 41, 77.

Language in *Moffitt v. Kelly*—plainly *obiter*, because expressly based on a pure hypothesis—postulates that the wife might have been taxed in California upon the right, assumed at her husband's death, of managing her interest free of his control; but the Court is careful to say, in the last sentence of the opinion, that

> "the nature and character of the right of the wife in the community for the purpose of taxation was peculiarly a local question which we have no power to review."

It is to be noted that the statute involved in *Moffitt v. Kelly* was a "succession tax", not an "estate tax". This is clearly pointed out in *In re Miller's Estate, 184 California, 678, 195 Pac. 413, 16 A. L. R. 694*, and in *Stebbins v. Reily, 268 U. S. 137, 143.*

Consequently, the utmost application that could be made of the *obiter* in question is that it concerns the right of a state to impose a tax *on the surviving wife*, because of her having received a thing of value by the death of the husband. There was no question in *Moffitt v. Kelly* of imposing an *estate* tax, *i. e.* one whereof the burden falls upon the heirs of the decedent, measured, both as to valuation

and as to rates, by the addition to what had been transmitted to his heirs of the value of the property already owned by his wife.

While before the Revenue Act of 1916, Congress had resorted to the principle of taxation upon the receipt of property by the survivors (see *Knowlton v. Moore, 178 U. S. 41*), yet the statute here involved, like all of its predecessors since 1916, is an estate tax.

Riggs v. Del Drago, No. 30, October Term 1942, ___ U. S. ___.

Statutory provisions relative to the incidence and collection of the tax emphasize. See Title 26, § 826. Thus, 826 (a), after providing for collection of the tax "under the provisions of general law", *i. e.* by assessment and distraint, goes on to authorize

> "appropriate proceedings may be commenced in any court in the United States having jurisdiction, in the name of the United States, to subject the property of the decedent to be sold under the judgment or decree of the Court".

It will be noted that it is "the property of the decedent" which may be sold. The decedent here owned only one-half of the community between him and his surviving widow. No provision authorizes the sale of her interest. The entire tax is to be paid out of that transmitted by Mr. Wiener's will to his sons, the appellees here.

It is true that by § 411 (b) of the Revenue Act of 1942, § 827 (b) of the Revenue Code purports to have been amended by imposing a secondary liability upon the surviving spouse for the estate tax to the extent of the value

of her interest; and to attach a lien to her property therefor. But Congress has never amended either § 826(a) or § 826(b): hence, under (a) no proceedings are authorized against the widow; under (b) the widow is entitled to reimbursement for the tax so paid by her.(1)

§ 826(b) provides:

> "If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor(2) in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this subchapter that so far as is practicable and unless otherwise directed by the will of the decedent *the tax shall be paid out of the estate before its distribution.*" (Italics ours).

Of course, it is fundamental that the Federal government has no power to regulate tenure of property within the several states, or to affect their laws of descent and

(1) Nothing in Detroit Bank v. United States, No. 156, October Term, 1942, ... U. S. ..., affects appellees' contention here. Any contrary contention is a begging of the question, since the issue here is the constitutionality of the attempt to include the survivor's interest in the estate of the decedent; whereas, in the Detroit case, the Court merely applied Tyler v. United States.

(2) There was no executor here. The universal legatees were sent into possession unconditionally, (Civil Code, Article 940, et seq.); since the local law deprecates administration, unless necessary for the purpose of liquidation.

3 La. Ann. 502, Succession of Story;
38 La. Ann. 716, Succession of Thibodeaux;
156 La. 1000, Succession of Watkins.

distribution. Mr. Wiener's estate comprehended his one-half of the community. And, though the widow's property be declared subject to the same lien, yet it is "the estate" (*i. e.* that of the deceased husband) which is made by the statute under attack responsible ultimately for all the taxes levied upon the basis of the double of its valuation. It was the property inherited by the appellees here which was made subject to execution and forced sale for the payment of the tax, measured both as to valuation and as to graduated rates by the inclusion of property in which they had no interest whatsoever. If the widow, as we have pointed out, had paid any part of the tax, she would, under § 826(b), be entitled to reimbursement from the heirs.

This brings out in clear relief the application here of *Hoeper v. Tax Commission*, *Heiner v. Donnan*, and other cases along the same line which hold that such method of taxation is such a violation of fundamental constitutional principles as to render it obnoxious to the provisions of the Fifth and Fourteenth Amendments. As said in *Heiner v. Donnan:*

> "The result is that upon those who succeed to the decedent's estate there is imposed the burden of a tax, measured in part by property which comprises no portion of the estate, to which the estate is in no way related, and from which the estate derives no benefit of any description. * * * Such an exaction is not taxation but spoliation".

Moreover, it is always to be borne in mind that the levy upon the estate, based upon a valuation of all that passed to Mr. Wiener's heirs, and then adding to that an equal value as representing what Mrs. Wiener had al-

ways owned, is not a mere matter of valuation: it greatly affects the rate of taxation. For example, if to a valuation of approximately $300,000.00, stipulated for the one-half of the community inherited by the present appellees (R. 11), there should be added the other $300,000.00 owned by the surviving widow and a level tax imposed, the result—if half the tax were payable by the widow—would be no detriment to the heirs.

But such simplicity does not inhere in this case. The rate applied for the computation of the Basic Estate Tax to an estate of $300,000.00 is 4%: to that of $600,000.00 is 5%. Likewise, the rate for the "Additional Estate Tax" applied to an estate of $300,000.00 rises to the 32% bracket, whereas in an estate of $600,000.00 the rate rises to 35%. The total Estate Tax, Basic and Additional, on the $300,000.00 estate would, as we have before observed, be $63,940.91. But one-half of the tax on the same estate wherein the widow's share was included, would be $82,297.74. Thus, the inclusion in Mr. Wiener's estate of the property which had always belonged to Mrs. Wiener would, even if Mrs. Wiener was under the primary obligation (which she is not) to pay one-half of the tax, still penalize these appellees $18,356.83. If the valuation of the entire community were, say, $6,000,000.00, the tax upon the one-half inherited by the heirs would total $1,263,200.00. But the tax to be paid by the same heirs (even if the widow paid one-half), were the valuation increased by the widow's one-half interest, would be thereby raised $305,900.00. Thus, the practical result of the impact of this form of taxation upon those who are alone, under the law of the State, entitled to share in the estate of the decedent, is graphically illustrated: even if

the collection statutes could be so construed as to require the surviving spouse to pay one-half of the amount of the tax.

This was the animating principle in the decision in *Hoeper v. Tax Commission.* For, manifestly, in the *Hoeper* case there could have been no complaint if the income tax there under consideration had been imposed at level rates. It was the graduated nature of the rates that impelled the decision of this Court that an income tax law combining the income of husband and wife, was obnoxious to the Fourteenth Amendment:

> "The assessor of incomes assessed against the appellant a tax computed on the combined total of his and his wife's incomes as shown by separate returns, treating the aggregate as his income. The amount so ascertained and assessed exceeded the sum of the taxes which would have been due had their taxable incomes been separately assessed,"

to which the Court adds the following footnote:

> "This resulted from the fact that the act provides for surtaxes graduated according to the amount of the taxpayer's net income. While the excess would have been less if returns and assessments had been made under section 71.09 (4) the total would still have been greater than the sum of the husband's and wife's taxes if separately assessed on their individual incomes."

Then, too, the confiscatory nature of the scheme embraced in the paragraph of the statute under attack, as the estate increases in value, is clearly developed in the tabulation on the opposite page, from which it will be noted that when the valuation of the entire community

reaches $5,100,000, the amount of the estate tax collectible from the heirs exceeds the total amount left by the decedent.

TABLE FOR COMPUTATION OF ESTATE TAX

Net estate equaling—	Net estate not exceeding—	For basic estate tax		For additional estate tax (tentative tax—total gross basic and additional taxes) In effect after September 20, 1941	
		Tax on amount in column (A)	Rate of tax on excess over amount in column (A)	Tax on amount in column (A)	Rate of tax on excess over amount in column (A)
			Percent		Percent
	$5,000		1		3
$5,000	10,000	$50	1	$150	7
10,000	20,000	100	1	500	11
20,000	30,000	200	1	1,600	14
30,000	40,000	300	1	3,000	18
40,000	50,000	400	1	4,800	22
50,000	60,000	500	2	7,000	25
60,000	70,000	700	2	9,500	28
70,000	100,000	900	2	12,300	28
100,000	200,000	1,500	3	20,700	30
200,000	250,000	4,500	4	50,700	30
250,000	400,000	6,500	4	65,700	32
400,000	500,000	12,500	5	113,700	32
500,000	600,000	17,500	5	145,700	35
600,000	750,000	22,500	6	180,700	35
750,000	800,000	31,500	6	233,200	37
800,000	1,000,000	34,500	7	251,700	37
1,000,000	1,250,000	48,500	8	325,700	39
1,250,000	1,500,000	68,500	8	423,200	42
1,500,000	2,000,000	88,500	9	528,200	45
2,000,000	2,500,000	133,500	10	753,200	49
2,500,000	3,000,000	183,500	11	998,200	53
3,000,000	3,500,000	238,500	12	1,263,200	56
3,500,000	4,000,000	298,500	13	1,543,200	59
4,000,000	4,500,000	363,500	14	1,838,200	63
4,500,000	5,000,000	433,500	14	2,153,200	63
5,000,000	6,000,000	503,500	15	2,468,200	67
6,000,000	7,000,000	653,500	16	3,138,200	70
7,000,000	8,000,000	813,500	17	3,838,200	73
8,000,000	9,000,000	983,500	18	4,568,200	76
9,000,000	10,000,000	1,163,500	19	5,328,200	76
10,000,000	20,000,000	1,353,500	20	6,088,200	77

ARGUMENT BASED ON MOFFITT v. KELLY COMPELS THE CONCLUSION THAT THE STATUTE IS VOID.

The application of the statute is not limited to the case where the husband died first: its language would compel its equal application where the husband is the survivor. It expressly provides that there shall be included in the taxable estate of the decedent

> "the interest therein held as community property by the decedent and surviving spouse".

Neither "decedent", nor "spouse" has particular gender. The "decedent" may well be the wife, the "surviving spouse" the husband. In such case, no one could be heard to contend that the husband had acquired any right by his wife's death. He had, in fact, lost whatever management and control he possessed during the marriage. Yet the statute operates equally in the assumed case as under the facts here involved. Moreover, as pointed out by the Supreme Court of the State, the wife may have died testate. She may have willed all her property to a stranger or to an enemy of the husband or to a paramour. In that case, the husband whose efforts had contributed so effectively to the building up of the community estate, finds himself still the owner of his original one-half, it is true, but with no power whatsoever over the other one-half; on the contrary, with the loss of its management and burdened with co-owners with whom he may be in utter disagreement.

Yet, the statute would include in the taxable estate the interest which the husband always had owned, without even a semblance of the pretext here advanced: be-

cause, instead of being invested by his wife's death with any right of management, he had lost whatever right in that respect that he had before possessed. And it is to be borne in mind that it is sought here to sustain the statute upon the contention that the wife comes into the management of her half of the community by her husband's death, and that such assumed right is the basis for constitutional authority for the provision under attack.

On settled principles, it is clear that if the statute be invalid in the case of the pre-decease of the wife, it is equally invalid in the case where it is the husband who died first.

> "By accepted canons of construction the provisions of the act in respect of this tax are not capable of separation."
>
> *Bowman v. Continental Oil Co., 256 U. S. 648.*

For here, Congress assumed to deal with the community as an entity. It carefully displayed its intent in the use of terms indifferently applicable to husband and wife. It provided for inclusion in the taxable estate of any "decedent" of the interest held as community property by the decedent and "surviving spouse". Nowhere in the statute may there be found aught upon which to hang argument that Congress would have legislated for this inclusion in the case of the husband only, or in the case of the wife alone. It was an all-inclusive provision, intended to follow the analogy of the inclusion of the entire property held by "tenants by the entirety", or by "joint tenants". In such case, even if Congress could have legislated validly to include the entire community in the case of the death of the

husband, its attempt here so to include the whole community in the case of the death of *either of the spouses* would render the entire enactment unconstitutional.

As this Court said in *Butts v. M. & M. Transp. Co., 230 U. S. 126, 134*, citing from *United States v. Reese, 92 U. S. 214:*

> "We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. * * * The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. * * * The courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere Congress is supreme and beyond the control of the courts; but if it steps outside of its constitutional limitations, and attempts to do that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings, must, annul its encroachments * * *. To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

The doctrine of *United States v. Reese* is fundamental in constitutional jurisprudence. See

Trademark Cases, 100 U. S. 82, 99;
Poindexter v. Greenhow, 114 U. S. 270, 304;
Baldwin v. Franks, 120 U. S. 678, 685;
Pollock v. Farmers Loan & Trust Co., 158 U. S. 601, 636;
Allen v. Louisiana, 103 U. S. 84;

United States v. Harris, 106 U. S. 641;
James v. Bowman, 190 U. S. 127, 140;
United States v. Ju Toy, 198 U. S. 253, 262;
Dorchy v. Kansas, 264 U. S. 286, 290;
Yu Cong Eng v. Trinidad, 271 U. S. 521.

Decisions from the Circuit Courts of Appeal to the same effect are almost without number. Well considered decisions will be found in

Pflueger v. United States, 121 Fed. (2d) 732, 735;
Cella Com. Co. v. Bohlinger, 147 Fed. 419 (8 L. R. A. (N. S.) 537, 542.

But it will doubtless be argued that one may complain only when his own constitutional rights are invaded, and that, consequently, decisions upon the constitutional issue should be reserved until there be before the Court a case where the wife predeceased her husband in community.

But such argument ignores what is fundamental: that no tax may be exacted without a statute so providing, and that no statute conflicting with the Constitution may have the effect of law.

The argument, moreover, is unsound because it is to the will of Congress, as expressed in the statute, that we must look to determine whether such legal authority for the imposition of a tax exists. If the statute by any construction would have been valid had it applied to the husband alone, it must by the same reasoning be held invalid when used as the basis for measuring the estate tax on the predecease of the wife. If Congress has so enacted the statute as to require judicial legislation to separate its

effect in the two cases, *i. e.* in the death of the husband and in the death of the wife, then the statute falls as a whole, and there is no authority for the inclusion of the entire community in the case of the death of either of the spouses.

This conclusion necessarily flows from a multitude of decisions by this Court.

In *United States v. Reese, 92 U. S. 214*, the statute held unconstitutional might constitutionally have been enacted had its effect been confined to the offense for which the defendant was indicted. Because, however, its effect extended to a field in which Congress had no power, this Court held it null as a whole, and avoided the indictment:

> "We are, therefore, directly called upon to decide whether a penal statute, enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress might rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution."

The *Reese* case was followed in the *Trademark Cases, 100 U. S. 82*, where this Court rejected the conten-

tion that the trademark statute might be sustained in part, because of the power of Congress to regulate trademarks used in commerce with foreign nations and in interstate commerce.

Again, the same doctrine was announced in *Allen v. Louisiana, 103 U. S. 80,* and in *United States v. Harris, 106 U. S. 641.*

In the leading case of *Poindexter v. Greenhow, 114 U. S. 270,* the same issue was presented in a civil proceeding. There the Court said, page 305:

> "It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see and to declare, that the intention of the Legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute for the law intended by the Legislature one they may never have been willing by itself to enact."

In *Baldwin v. Franks, 120 U. S. 678,* Congress clearly had the power to penalize the specific offense of which the defendant was accused. But because the statute, in addition, covered other acts whose punishment was not within the power of Congress, and because a reading of the Statute demonstrated that its provisions were inseparable without judicial legislation, the Court held the entire statute unconstitutional and discharged the defendant.

The precise point was again decided in *James v. Bowman, 190 U. S. 127, 142.*

As said by Mr. Justice Holmes in *United States v. Ju Toy, 198 U. S. 253, 262:*

> "The relevant portion being a single section, accomplishing all its results by the same general words, must be valid as to all that it embraces, or altogether void. An exception of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what remains. That has been decided over and over again."

The whole subject is reviewed in *Butts v. M. & M. Transp. Co., 230 U. S. 126,* where, again, the punishment of the specific offense would have been within the competency of Congress, but where the statute, in general terms, included offenses not within its power of legislation.

In *Yu Cong Eng v. Trinidad, 271 U. S. 521,* the doctrine of the *Reese* case was again involved, this Court saying:

> "We fully concede that it is the duty of a court in considering the validity of an act to give it such reasonable construction as can be reached to bring it within the fundamental law. But it is very clear that amendment may not be substituted for construction and that a court may not exercise legislative functions to save the law from conflict with constitutional limitation."

In the First Employers' Liability case, *Howard v. I. C. R. Co., 207 U. S. 463,* there was at issue the constitutional validity of the Act of Congress of June 11, 1906, 34 Stats. 232. The employee was killed while serving

as a fireman on a locomotive actually engaged in moving an interstate commerce train. It was conceded that Congress had the power to legislate with respect to employers' liability as to employees actually engaged in interstate commerce: just as this Court subsequently had occasion to hold in the Second Employers' Liability case, *Mondou v. N. Y., N. H. & H. R. Co., 223 U. S. 1.* This Court, however, held that the statute unambiguously covered all operations, in intrastate as well as in interstate commerce: thus including a subject matter clearly beyond the power of Congress. It, therefore, denied relief, although the decedent's injury was occasioned while he was engaged in interstate commerce, as to which Congress could validly have legislated.

In response to the argument that the statute might be sustained as to interstate commerce, this Court said:

> "The principles of construction invoked are undoubted, but are inapplicable. Of course, if it can be lawfully done, our duty is to construe the statute so as to render it constitutional. But this does not imply, if the text of an act is unambiguous, that it may be rewritten to accomplish that purpose. Equally clear is it, generally speaking, that where a statute contains provisions which are constitutional and others which are not, effect may be given to the legal provisions by separating them from the illegal. But this applies only to a case where the provisions are separable, and not dependent one upon the other, and does not support the contention that that which is indivisible may be divided. Moreover, even in a case where legal provisions may be severed from those which are illegal, in order to save, the rule applies only where it is plain that Congress would have enacted the legislation

with the unconstitutional provisions eliminated. All these principles are so clearly settled as not to be open to controversy."

Upon a consideration of these authorities, it is, with respect, submitted that all of the argument advanced upon the theory that the wife comes into possession of a right upon the death of her husband must wholly disappear, even if it had the semblance of substance before, when it is considered that the statute operates equally upon the death of either of the spouses, and that the prior death of the wife can, in no sense of the word, be said to confer any right of any kind or character upon the husband.

III.

THE STATUTE IS VIOLATIVE OF THE GEOGRAPHICAL UNIFORMITY CLAUSE OF ARTICLE I, PARAGRAPH 8 OF THE CONSTITUTION OF THE UNITED STATES.

No time will be lost with discussion of the various forms in which Congress is empowered to lay taxes. They are unlimited in their manner, scope and effect, except as otherwise provided in other articles of the Constitution itself. Direct taxes may be levied in each State only in proportion to the inhabitants thereof. Excise taxes must be "uniform" throughout the United States.

Is the tax measured by this basic statutory uniformity throughout the United States? If it is not, the statute must fall.

There is a dearth of authority upon the impact of this inhibition upon the taxing power: in all probability because Congress has never before sought, plainly and unequivocally as here, to discriminate by statute against citizens of particular states.

We have no quarrel with the doctrine which will be unquestionably urged *(Knowlton v. Moore, 178 U. S. 41)* that the words "uniform throughout the United States"

> "simply requires that whatever plan or method Congress adopts for laying the tax in question, the same plan and the same method must be made operative throughout the United States; that is to say, that wherever a subject is taxed anywhere, the same must be taxed everywhere throughout the United States, and at the same rate."

But if, as is basic here, each of the members of the marital partnership has a present vested equal ownership in the community property, then husband and wife are equal co-tenants of every asset of the community. They are tenants in common. They are co-owners, each in equal proportion.

If Congress had said that all property owned in indivision by co-owners should be included in the estate tax of any one of such co-owners, the Act would have been geographically uniform, however obnoxious it might have been to the due process clause of the Fifth Amendment.

But the Act does not do this. It limits its scope, and hence the amount of the tax which it imposes, to those co-owners whose co-proprietorship is in the form of the community under the law of their respective states. All other co-proprietorships are ignored.

Thus the statute, in express terms, limits its effect to that minority of states in which the community system prevails by law; for, in providing for the inclusion

> "in the value at the time of his death of all property real or personal, tangible or intangible * * * to the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any state, territory or possession of the United States * * *",

it expressly confines its effect to property held in community by virtue of a state law. It does not apply to property held under a like partnership by conventional arrangement. There is nothing in the law of many of the states that would prevent husband and wife entering into partnerships in acquiring property, holding and disposing of it under conditions and limitations similar to those under which the legal community is held in the nine states of the Union in which that system prevails by law. See *Annotation, 20 A. L. R., page 1305.*(1) Yet, in none of the cases where the common ownership and management by the husband is in effect through contract or otherwise than by the sole effect of the law of a community state in which the decedent happened to be domiciled, would the statute be effective. For example, it would not apply to the situation where husband and wife had changed their

(1) This has been recognized in many income tax cases:
Elihu, Clement and Wilson, 11 B. T. A. 965;
John T. Newell, 17 B. T. A. 93, and cases cited;
Glen M. Harrington, 21 B. T. A. 260;
Richard H. Oakley, 24 B. T. A. 1082;
N. H. Hazlewood, 29 B. T. A. 595;
J. Kammerdiner, 25 B. T. A. 495;
Rose v. Commissioner (C. C. A. Sixth), 65 Fed. (2d) 616;
Champlin v. Comer (C. C. A. Tenth), 71 Fed. (2d) 23;
Commissioner v. Barnes (C. C. A. Third), 30 Fed. (2d) 289;
Kell v. Commissioner (C. C. A. Fifth), 88 Fed. (2d) 453.

domicile to a non-community state, although for all practical purposes, the property relation thereby remained unchanged. *Beale, Conflict of Laws, § 292.1.* Its operation would be, by its own terms, limited to citizens of those states wherein the co-tenancy known as community operates through the effect of their own sovereign laws.

It would be idle to argue that this is not a departure by Congress itself from the rule of uniformity, but a result of different property laws in the states affected. Congress itself has said otherwise, in so many words, by providing that the estate tax shall be measured, not by the property of the partner in community who has died, but

> "to the extent of the interest therein held as community property by the decedent and surviving spouse *under the law of any state, territory or possession of the United States*". (Italics ours).

By express language, Congress has therefore carefully singled out the co-tenancy known as "community" as an exception to the rule that a surviving co-tenant's interest is not includible in the estate of the deceased co-tenant. For, in significant words, Congress has made this discrimination dependent upon the creation of the co-tenancy by the law of such states in which that system of ownership prevails. Thus, to discriminate, and to base such discrimination upon the municipal law of the State in which the co-owners happen to be domiciled, would seem clearly an infringement upon the constitutional requirement of geographical uniformity.

IN CONCLUSION.

It is respectfully submitted that the judgment of the Supreme Court of Louisiana is correct and should be affirmed.

Respectfully submitted,

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APPENDIX.

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Act 127 of Extra Session of 1921:

Section 3. It shall be unlawful for any heir, legatee or other beneficiary of a donation mortis causa to take or be in possession of any part of the things or property composing the inheritance legacy or other donation mortis causa, or to dispose of the same or any part thereof, until he shall have obtained the authority of the Court to that effect, except as hereafter provided in Section 17; and in case he shall so take or be in possession or shall so dispose of such things or property, or any part thereof, he shall no longer have the right of renouncing such inheritance or donation mortis causa, and shall remain personally liable for the tax thereon; but he may, without waiting for authority do such acts as may seem necessary to preserve the property from waste, damage or loss.

Section 4. The executor of the will of a person deceased, or the administrator of his succession, shall, except as hereafter provided in Section 17, after payment of his debts, proceed against the tax collector and all the heirs and legatees of the deceased summarily, by rule before the court which has jurisdiction of the succession, to fix the amount of tax due by each heir or legatee, and on trial thereof the court shall render judgment for the same against each heir or legatee, with interest and costs, as hereinafter provided.

Section 5. The executor or administrator shall thereupon pay to the tax collector the amount of tax, with interest and costs, so fixed, on each inheritance, legacy or donation, out of the funds comprised therein, if sufficient. Should there not be sufficient funds, the court shall, on

the application of the heir or legatee, grant an order for the sale of the property composing such inheritance, legacy or donation, or so much thereof as may be necessary, for the purpose of paying such judgment. If the same be not paid by the heir or legatee, or an order of sale be not granted, as above provided within thirty days after the date of the judgment, the court shall, on the application of the executor or administrator, grant an order of sale for the said purpose, as above provided, and the executor or administrator shall pay the said judgment out of the proceeds of the sale.

Such sale shall be made in such manner, and on such terms and conditions as the Court shall prescribe, and the expense thereof shall be borne by the heir or legatee.

Section 6. No executor or administrator shall deliver any inheritance, or legacy until the tax thereon shall be fixed and paid, as herein provided; otherwise he, together with his surety, shall be personally liable for said tax, with interest and cost. And no executor or administrator shall be discharged until it is shown that all taxes under this Act, due by the heirs and legatees, have been paid, or until it is judicially determined by the process herein provided that no tax is due.

Section 7. In all cases in which an administration is not ordered by the court, the legal or instituted heir, or universal or residuary legatee, except as hereafter provided in Section 17, shall within six months after the death of the decedent, or, should there be a will, within the same time after the discovery of same, present to the court a

detailed descriptive list, sworn to and subscribed by him, of all items of property contained in and composing the estate of the decedent, and therein shall state the actual cash value of each such item at the time of the death of the decedent, and service thereof shall be made on the tax collector who shall have the right to traverse the same. Should the deceased have made special or particular legacies or donations mortis causa, the legatee shall also be served, and after summarily hearing the parties the court shall fix the amount of tax due as aforesaid by each such heir or legatee, and shall render judgment therefor, with interest and costs, against each of them.

Section 8. In the same manner as provided in Section 5, the heir or universal or residuary legatee shall thereupon pay or take measures for the payment of the tax due on all special or particular legacies or donations.

Act 119 of 1932:

Section 1. Be it enacted by the Legislature of the State of Louisiana, That there is hereby levied, in addition to the inheritance tax as now provided by Act 127 of 1921, as amended by Act 44 of 1922, an estate transfer tax upon all estates which are subject to taxation under the Federal Revenue Act of 1926.

Section 2. Whenever the aggregate amount of all inheritance, succession, legacy and estate taxes actually paid to the several states of the United States in respect to any property owned by such decedent shall be less than eighty percent (80%) of the estate tax payable to the

United States under the provisions of the said Federal Revenue Act of 1926, but not otherwise, the difference between said amount and said eighty percent (80%) shall be paid to the State of Louisiana.

Section 3. The provisions of Act 127 of 1921 as amended by Act 44 of 1922, insofar as applicable shall regulate the proceedings to fix the amount of the tax hereby levied and the manner in which same shall be collected.

Section 4. It is hereby declared to be the intent and purpose of this Act to obtain for this state the benefit of the credit allowed under the provisions of title III, Section three hundred and one, sub-section (b), of the Federal Revenue Act of Nineteen Hundred Twenty-six to the extent that this State may be entitled by the provisions of said Act, by imposing additional taxes, and the same shall be liberally construed to effect this purpose.

Section 5. The provisions of this Act shall apply to all estates not fully distributed and now in process of settlement, where the date of death was subsequent to February twenty-six nineteen hundred twenty-six; provided there is at the time this act goes into effect a sufficient amount still due the United States Government under said Federal Revenue Act of 1926 from which to make the deduction contemplated by Section 3 hereof.

Section 6. If any section or portion of this Act be finally held to be unconstitutional by a court of competent jurisdiction such decision shall not invalidate the portions unaffected thereby.

Articles of the Louisiana Civil Code:

86. The law considers marriage in no other view than as a civil contract.

2325. In relation to property, the law only regulates the conjugal association, in default of particular agreements, which the parties are at liberty to stipulate as they please, provided they be not contrary to good morals, and under the modifications hereafter prescribed.

2329. Every matrimonial agreement can be altered by the husband and wife jointly before the celebration of marriage; but it cannot be altered after the celebration. Provided that in the case of married couples removing to this State and settling therein from other States and countries after marriage, they shall have the right at any time within one year after the passage of this act, or a like period after such settlement in this State, to make a valid marriage contract, subject in all other respects to the laws of this State.

2332. The partnership, or community of acquets or gains, needs not be stipulated; it exists by operation of law, in all cases where there is no stipulation to the contrary.

But the parties may modify or limit it; they may even agree that it shall not exist.

2392. Married persons may stipulate that there shall be no partnership between them.

2399. Every marriage contracted in this State, superinduces of right partnership or community of acquets or gains, if there be no stipulation to the contrary.

2402. The partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estate which they may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two and not of both, because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase. But damages resulting from personal injuries to the wife shall not form part of this community, but shall always be and remain the separate property of the wife and recoverable by herself alone; "provided where the injuries sustained by the wife result in her death, the right to recover damages shall be as now provided for by existing laws."

2424. Married persons may, by their marriage contract, modify the legal community, as they think fit, either by agreeing that the portions shall be unequal, or by specifying the property, belonging to either of them, of which the fruits shall not enter into the partnership.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

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versus

SAMUEL G. WIENER, WILLIAM B. WIENER AND JACQUES L. WIENER APPELLEES.

On Appeal from the Supreme Court of the State of Louisiana.

BRIEF OF AMICI CURIAE

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BRIEF OF AMICI CURIAE

INTRODUCTION

The undersigned members of the Bar of the States of Louisiana, Texas, Washington, California, Idaho and Arizona, having obtained the written consent of the parties to this proceeding so to do, in accordance with Rule 27, (9) of this Court, file this brief as *amici curiae*. They do so because of the probable effect of the decision in this cause upon the application of the 1942 amendment of

the Federal Estate Tax Act (as hereinafter set out) with reference to the interest in marital community partnership property held as such by a "decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country".

There are eight states in this country where the existing system of community property referred to is "traditional", to-wit: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington. That system was a part of the fundamental law of the "Mother Countries" of most if not all of these states. For example, the State of Texas carried forward the system adopted by the Republic of Texas from the laws of Spain and Mexico; the State of Louisiana carried forward the system based on the laws of France and Spain; and most of the other states and territories were formed out of the area acquired from Mexico by the Treaty of Guadalupe Hidalgo and carried forward the system based on the laws of Spain or France. It is presumed that the reference in the Statute to the community property law of "any foreign country" pertains primarily to "Mother Countries". Two other states contiguous to one or more of these states have since adopted the community partnership property system in whole or in part, to-wit, the States of Oklahoma and Oregon. However, the attorneys filing this brief as *amici curiae* are only authorized to appear in behalf of the public interest existing in the traditional community partnership property states, and act in that capacity as reflected at the close of this brief.

OPINIONS BELOW

The opinion of the Supreme Court of Louisiana (R. 19-30) is reported at 14 So. (2d) 475. The District

Court rendered no formal opinion. The judgment of that Court appears at Record 13.

JURISDICTION

The opinion and judgment of the Supreme Court of Louisiana were entered June 21, 1943 (R. 19-30). Motion for Rehearing was denied July 13, 1943 (R. 30-31). Order allowing appeal was entered July 17, 1943 (R. 33), and the record was filed in this Court on August 9, 1943. Jurisdiction vests in this Court by virtue of 28 U.S.C. § 344 (b) or if the contention of the Attorney General of the United States below were correct, the case is reviewable by *certiorari* (28 U.S.C. § 344 (b) and such review would be had "under the papers whereon the appeal was allowed" (28 U.S.C. § 344 (c)).

QUESTION REPRESENTED

Section 402 (b) of the Revenue Act of 1942, which amended **Section 811 (e)** of the Internal Revenue Code, added the following new provision to the Estate Tax Law, requiring for the first time that there be included in a decedent's gross estate:

> "(2) Community interest.—To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition."

The question presented is the validity of this amendment to the extent that it requires the estate tax due by a decedent to be measured, in whole or in part, by the value of the interest of the surviving spouse in community partnership property.

The brief filed in this case by the United States as *amicus curiae*, while the case was pending in the Supreme Court of Louisiana, summarizes the matter at page 18 thereof as follows:

> "The constitutional question is whether Congress can assess a tax against a decedent's estate measured by the full value of the community property (with the statutory exclusion) in light of the fact that prior to the death the surviving spouse had a 'vested', undivided community property half-interest therein."

STATUTES INVOLVED

The pertinent Federal Statutes and State Statutes are included in the Appendix, pp 1 to 16 *infra.*

STATEMENT

Sam Wiener, Jr. died December 19, 1942, after the effective date of the aforesaid amendment. He and his wife were residents and citizens of Louisiana and were married in Louisiana. He was survived by his wife, to whom he had been married on February 12, 1907, and four children. At the date of his death, he and his surviving wife were possessed of a community estate valued, after debts, succession charges and taxes, at more than $600,000. He bequeathed his one-half interest in this property to three of his children as universal legatees. (R. 10, 11).

In an appropriate proceeding in the First Judicial District Court of Louisiana, Parish of Caddo, to fix the inheritance taxes due the State of Louisiana, by virtue

of Act No. 119 of the Legislature of Louisiana for the year 1932,[1] (the ordinary "take up" statute in force in most States by which the inheritance taxes due the State are fixed at a minimum of 80% of the basic federal tax), the Appellant, in his official capacity as tax collector, contended that, since the aforesaid Section 402 (b) of the Revenue Act of 1942 required all of the community property to be included in the gross estate of the decedent, the basic federal estate tax was accordingly increased, and, therefore, the 80% thereof levied by the State statute was increased, with the result that there was, as Appellant contended, $14,330.90 due the State of Louisiana, rather than $8,224.09 which would have been due if the basic federal estate tax had not been measured by the total community estate (R. 8, 11- 12).

The universal legatees responded that the aforesaid amendment violated the Due Process Clause of the Fifth Amendment to the Constitution of the United States, and Section 8 of Article I of the Constitution (R. 9). The District Court upheld this contention (R. 13). On appeal to the Supreme Court of Louisiana an amended plea of unconstitutionality was filed to meet the point raised by the Attorney General of the United States, who appeared as *amicus curiae* in the Supreme Court of Louisiana; this point being that the tax liability in issue was only that imposed by the State statute. The amended plea was to the effect that viewed from that aspect, the State statute either alone or in conjunction with the Federal statute violated the Fourteenth Amendment to the Constitution of the United States. (R. 17).

The Supreme Court of Louisiana affirmed the decision of the District Court, holding that the Federal Statute violated the Due Process Clause of the Fifth

[1]Appendix p 11, *infra*

Amendment and that, if the matter be considered as State action, the Fourteenth Amendment to the Constitution was violated. (R. 19-30).

The Tax Collector duly appealed to this Court (R. 31-33).

It is obvious that the decision of this Court on the question presented will have a most important bearing upon the application of Section 402 (b) of the Revenue Act of 1942, and the "take up" Statutes in all Community Property States,[1-a] to the citizens of those States, and Estates therein situated. This, we respectfully submit, justifies the submission of this brief upon behalf of those so interested and so to be affected by the holding in this case.

SUMMARY OF ARGUMENT

Section 402 (b) of the Revenue Act of 1942, (amending **Sec. 811 (e)** of the Internal Revenue Code) provides that all property held by a decedent and spouse in community shall be included in the gross estate of the decedent, except that portion shown to have been received as compensation for personal services actually rendered by the survivor, or derived from such compensation, or from the separate property of the survivor, but in no case less than the share over which the decedent had the power of testamentary disposition. This statute violates the Due Process and Uniformity Clauses of the Constitution, and is, therefore, invalid, because:

1. Community partnership property, the bulk of which frequently comes from sources other than the

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[1-a] These "take up" Statutes are very much alike. The Louisiana Statute is set out in the Appendix, p 11 *infra*; the Taxes Statute is Ch. 5 A, Art. 7144 a, Revised Civil Statutes of Texas, as amended by Acts of 1933, 43rd Legislature, p. 581, Ch. 192, Para. 2b. The Washington Statute is Sec. 11202 B of Remington's Revised Statutes of Washington, edition of 1933; the California Statute is California Inheritance Tax Act of 1935, Section 2, Subsection (12), etc.

income from separate property of either spouse or compensation for personal services actually rendered by either spouse, is, from the moment of acquisition and regardless of the method of acquisition, owned jointly and equally by the spouses, neither deriving title from the other. This ownership is real, practical, full and complete, including both present ownership and full power of testamentary disposition—not diminished by the powers of management which varying local laws place in one or the other spouse, and which may be changed as frequently as local authorities see fit. Prior to the 1942 amendment, this ownership of community partnership property was recognized by the United States Government and all of its departments as the controlling factor in determining the property included in a decedent's gross estate,—as it was as to all property in non-community property States,—so that one-half of all community partnership property was included in the gross estate of the first spouse to die, and the other one-half in the gross estate of the second to die.

Under the express terms of the amendment, the test of ownership is abolished,—as to community partnership property only,—and there is substituted, as to the bulk of such property, the conception of dual, but complete, ownership by both spouses, so that this bulk is taxed as a part of the gross estate of the first to die, depending not on source, actual ownership or management, but upon the sheer accident of which spouse predeceases the other. As to some property (compensation and derivatives from separate property), the source controls if, and only if, the first to die received the compensation or owned the separate property, and requires all such property to be included in such recipient's gross estate. If the first decedent did not receive the compensation or the derivatives from separate property,

source is disregarded, and one-half is included in the gross estate of such decedent. Power of testamentary disposition limits the minimum amount to be included in the gross estate, so it can not be less than the amount over which the decedent had power of testamentary disposition (one-half); but it does not control for, in most cases, property over which the decedent had no power of testamentary disposition is included in his or her gross estate. A shifting of management is not made determinative, for frequently property never managed by the decedent is included in his or her gross estate.

The "prior taxed property" statutes not being applicable, one-half of the community must be included in the gross estate of the surviving spouse, upon his or her death, without regard to the time elapsed since the same property was taxed as a part of the gross estate of the first decedent. Only one-half of community debts can be deducted in arriving at the net estate, though all community assets are included in the gross estate. There are numerous other instances of arbitrary and capricious action resulting in gross discrimination and, frequently, in the confiscation of the entire estate.

2. This method of taxing community property is so capricious, arbitrary, discriminatory and confiscatory as to violate the Due Process Clause of the Fifth Amendment. If the present case be considered as an exertion of State power, it violates the Due Process Clause of the Fourteenth Amendment. It is a plain example of measuring the tax imposed upon A by the value of B's property. This Court has condemned such a system as violating the Due Process Clauses of both the Fifth and Fourteenth Amendments of the Constitution of the United States.

3. Neither the **Tyler** nor **Jacobs** cases, nor any other decisions of this Court, support the statute, as so

amended, or justify a holding that it is valid. They could not support such a statute for Congress has never before attempted to measure an estate tax by the value of property which the decedent did not own at death or of which he had never made a disposition, donative or testamentary in character, or had power to make such disposition under a general power of appointment. The heart of the cases as well as the statute, dealing with tenancies by the entirety and joint tenancies, is that the property included in a decedent's gross estate originally belonged to him and passed from him to one who survived him by an act donative or testamentary in character. This theory is never applicable to community partnership property. Neither spouse derives ownership, gratuitously or otherwise, from the other.

4. This method of taxing community property also violates the geographic uniformity requirement of Article I, Section 8, of the Constitution of the United States, in that objects are taxed in community property States when the same objects are not taxed in other States. The amendment is directly and expressly aimed at the territory composed of States having a marital community property system. Whether the factors controlling the incidence of the tax be considered as the termination of the marriage relation by death, a shifting of control occasioned by death, the passage of property by death, or an increase in a living person's economic rights occasioned by the death of another; the same factors do not control in non-community states. The effect of the death of a partner, managing or otherwise, of a trustee, executor, general agent or guardian, as well as the statutory method of taxing estates by the entirety and joint-tenancies, sufficiently illustrate the utter disregard of geographic uniformity required by the statute, as amended.

A committee of Congress, in recommending the amendment, declared that they were moved by a so-called tax advantage in favor of community partnership property States under the established system. There is no basis for this charge. Taxes are usually, if not necessarily, imposed upon, or measured by, the property of the taxpayer, not that owned by another. Ownership must be determined by the practical substantial rights afforded by State law. Community partnership property met that test in this Court many years ago. It is not within the competency of the Congress to vary these rights or to establish, or even favor, a marital property system uniform and nation-wide in scope. To recognize actual, substantial ownership in determining the incidence of a tax can never be discriminatory. Each system has compensating burdens and benefits. But to recognize ownership in some States and to tax by no standard, other than caprice, whim or accident in others, contrary to established rules of property and to established presumptions, will produce a total lack of geographic uniformity, as well as the grossest confusion and discrimination, violating the fundamental concepts of the Constitution and our system of power divided between the Nation and the States.

ARGUMENT

I.

In demonstrating the invalidity of the Federal Statute here in question (Sec. 402 (b) of the Revenue Act of 1942), we desire briefly to review the sources and nature of community partnership property in Louisiana (and the other Community Partnership Property States); and then analyze the statute itself. When the statute is considered against the background of the community partnership systems to which it is addressed, its arb-

trary, capricious and discriminatory character becomes apparent.

Sources of Community Partnership Property

The record reveals only that Wiener was married in 1907 and that the property used to measure the tax here involved was all of the commmunity partnership property acquired during the existence of the marriage which his death terminated, and owned by him and his wife at death. Nothing is shown as to his business activities. It is necessary, therefore, to resort to the statutory definition of "community partnership property" to determine from what sources this property could have been acquired.

In Louisiana, all property found in the possession of either spouse upon dissolution of the marriage is presumed to be community partnership property, unless it can be clearly identified as belonging to the separate estate of one or the other. (Louisiana Civil Code, Art. 2405, Appendix 13, *infra.*) The separate estate of either spouse is that property which that spouse owned at marriage or thereafter acquired by gift, devise, or inheritance. Revenues from separate property, as a general rule, fall into the community partnership (Louisiana Civil Code, Articles 2402, 2599, 2406, 2404, 2385, 2386, Appendix pp 13, 14; *infra.*) Property once separate can lose that separate character and become commmunity partnership property through commingling; the community is the favored estate and everything not identifiable as separate property falls therein, regardless of its method of acquisition.

Therefore, the property used to measure the tax in this case must have come from one, or more, or all, of the following sources:

(a) Savings from compensation received for the husband's personal services;

(b) Savings from compensation received for the wife's personal services;

(c) Savings from revenues of the wife's separate estate;

(d) Savings from revenues of the husband's separate estate;

(e) Profits from gainful occupation where neither spouse nor minor children received compensation for services actually rendered, such as farming, ranching, merchandising, manufacturing, etc.;

(f) Property purchased during marriage on credit or with borrowed funds;

(g) Property acquired with commingled or unidentified property or with joint funds;

(h) Miscellaneous sources, as, for example, property acquired with savings from compensation received for the personal services of minor children, or property acquired by adverse possession, and similar acquisitions;

(i) Profits from reinvestment of property or funds received from sources (a) to (h) inclusive.

The parties here were married for some thirty-four years (R. 10, 11). Never before the amendment of 1942 now in question had there been necessity of husband and wife keeping records showing the source of funds used to acquire community property and the investment, from time to time, of the revenues of community partnership property. Therefore, in the generality of cases and, undoubtedly, in this case, it is impossible, upon the death of the spouse most familiar with the business transactions, for his executor or legatee to trace all of the transactions of a long married life and determine through many muta-

tions and changes the origin of each particular community asset on hand at death.

Nature of Community Partnership Property

The nature of community partnership property is well known to this Court. It was summarized by this Court in *Bender v. Pfaff*, 282 U. S. 127; and also by the highest Court of Louisiana in its opinion in this case. That opinion is controlling as to the interest owned by the husband and the surviving spouse at the time of his death and as to the rights which terminated at the husband's death. As detailed in that opinion, the property rights of the surviving wife in the community partnership property may be summarized as follows:

1. The wife is an equal owner with her husband in all of the community partnership property. The wife's rights, interest and title are equal to the husband's and are of equal dignity.

2. The wife does not take her title through or under the husband; he never owned any interest in her portion of the property, inasmuch as she acquired it by onerous title at the very moment of its acquisition by the community partnership and she continued uninterruptedly to hold such title so long as the property remained an asset of the community.

3. The husband owned no interest in the wife's portion of the property which terminated with his death. Her portion of the property is not subject to the payment of his debts and he can not and did not dispose of it by Will. Upon his death his one-half passes to his heirs or legatees; she simply retains the equal interest in the property which she owned as co-owner prior to her husband's death.

4. The relationship is analogous to a commercial partnership in which the husband and wife are equal half

partners. The husband, invested with management by the contract of the partners and by statute, stands in the same category as a contractual managing partner. The rights of the husband and wife spring "from an express legal contract of partnership entered into at the time of the marriage."

5. The wife enjoys full power of testamentary disposition over her half interest in the property. She can will it to whom she choses, even to her paramour, and her husband is powerless to prevent it.

6. At her death without a Will her interest passes to her heirs at law, even though those heirs be illegitimate children by another man, and her husband is powerless to prevent this.

7. If the husband proves a bad or incompetent manager she has the right to a partition of the community property and the delivery to her of her half interest.

8. If the husband, as fiduciary and managing partner, is guilty of fraud, she likewise has the right to a liquidation of the partnership and a partition of the property and the delivery to her of her half interest.

9. In the case of a legal separation without divorce, she again has the right to a liquidation of the partnership and a partition and the delivery to her of her half interest.

10. In the case of a divorce, she has the right to her one-half interest even though she be guilty of the grossest sort of misconduct, such as adultery, and the Court is powerless to deliver to her any less than her full one-half interest.

11. Her half interest is subject to the payment of her one-half of the community debts incurred during the existence of the partnership.

12. She is liable for income taxes on the property which represents her one-half of the partnership income.

13. At her death her legatees or heirs are liable for Louisiana Inheritance Taxes for the privilege of receiving her half interest in the property.

14. At her death her estate prior to the 1942 amendment was liable for Federal Estate Taxes imposed on the privilege of transmitting her half interest in the partnership property at death.

It is clear, therefore, that, in Louisiana, the wife is the full, equal co-owner with her husband of the community partnership assets. Her husband's interest as managing partner is not a beneficial interest. He is merely the managing partner of the partnership, but his powers of management are restricted and circumscribed. He cannot use the property for the improvement of his separate estate or to pay his separate debts. While he may invest and reinvest the proceeds of any sale, any property so acquired immediately becomes community partnership property in which his wife possesses a full one-half interest. His management of her interest in the property terminates upon separation, upon divorce, upon a show of fraud, or even upon a show of bad or incompetent management. Moreover, the husband becomes the managing partner in the first instance by virtue of the marriage contract. Under the statutes of Louisiana, the wife can, by an ante-nuptial agreement with her husband, stipulate that there shall be no community, or by agreement make herhelf, rather than him, the managing partner,[1b] or

[1b] In some States, for example, Texas, a certain class of community property, to wit, the wife's earnings, the income from her separate property, and property acquired with such earnings or income are administered by the wife as the managing partner. *In re Gutierrez*, 33 Fed. (2d) 987 (S. D. Texas). Similarly, if a husband becomes insane or abandons his wife, she becomes the managing partner as to all community property.

agree that the community partnership shall be managed jointly by husband and wife or vary the partnership agreement in any other way they see fit. Louisiana Civil Code, Articles 2399, 2329, 2325, 2392, App. pp. 15, 16 *infra*; *Desobry v. Schlater* 25 La. Ann. 1425.

The above summary clearly shows that the wife in Louisiana is the actual owner of a full one-half undivided interest in the community partnership property, possessed of all of the legal incidents of ownership. The limited, safeguarded and permissive management granted to her husband is as a managing partner; is that of a fiduciary and is limited both in scope and duration. The wife possesses the entire bundle of rights that go to make up actual ownership of property. The husband possesses only limited managing powers as agent, managing partner or trustee for his wife.[2]

Prior to the Estate Tax Amendment accomplished by the Revenue Act of 1942, the Estate Tax was applied to Community Partnership Property in the same way that it was to all other property;—the tax was measured by the value of the property which passed by reason of the death of the decedent. In no case was the tax measured by property which the decedent did not own at death, and which he had never owned. Under this system, since each spouse in a Community Partnership Property State owns one-half of the Community Partnership Estate, and the survivor's one-half is not derived from and had never been owned by the decedent, the tax imposed upon the estate of the first to die, whether husband or wife, was

[2]Rules in the other several community property states are substantially the same with some minor variations. See *Poe v. Seaborn*, 282 U. S. 101 (Wash.); *Jacob O. Bender v. Wm. Pfaff*, 282 U. S. 127 (La.); *Fred O. Goodell v. O. B. Koch*, 282 U. S. 118 (Ariz.); *Hopkins v. Bacon*, 282 U. S. 122 (Tex.); *U. S. v. Malcolm*, 282 U. S. 792 (Calif.). See also *Warburton v. White*, 176 U. S. 484; *Arnett v. Reade*, 220 U. S. 311. In some States the income from the separate property of the spouses does not become community partnership property.

measured in determining the amount of the Federal Estate tax, by the value of one-half of the Community Partnership Estate. Upon the survivor's death, the survivor's half of the property was taxed, as in all other cases. (T. D. 2450, T. D. 3138, T. D. 3670).[2b]

[2b]The Treasury Department Decision applying the Federal Estate Tax to Community Estates of spouses residing in Texas, on this basis, was the first ruling on the subject and was promulgated as early as August 24, 1920 as T. D. 3071. It clearly recognized the distinction between community estates and estates by the entirety.

The second Treasury Decision relative to the application of the Estate Tax to community estates generally, was promulgated March 3, 1921, and was predicated upon the opinion of Attorney General Palmer dated February 26, 1921. It applied the same rule as previously applied in Texas to spouses residing in the states of Washington, Arizona, Idaho, New Mexico, Louisiana and Nevada.

Treasury Decision 3670 was the result of a review of prior rulings regarding the application of the Federal Income Tax Act and the Federal Estate Tax Act to community partnership property of spouses residing in the State of California. The decision left open for review by the courts of the application of the Federal Income Tax, but was accompanied by an opinion of Hon. Harlan Stone, Attorney General, dated October 9, 1924, which precluded any further court tests of the application of the Federal Estate Tax to community estates of citizens residing in California, particularly in view of the opinion of the Ninth Circuit Court of Appeals in the case of *Wardell vs. Blum*, 276 Fed. 226, in which *certiorari* had been denied by the Supreme Court of the United States. Though the Attorney General then recognized that there was doubt under the California decisions as to whether the wife had a vested interest in community property that would authorize her to return one-half of the community property as her own while the spouses were alive, he, nevertheless, reached a different conclusion as to the application of the Federal Estate Tax, saying of the existing exemption of the wife's interest from the Federal Estate Tax:

> "If the widow takes by virtue of her ownership in community property which is held by the community subject only to the power of disposition of the husband, obviously the estate tax has no application. * * * a study of the true character of that interest as it existed in the Spanish Law and as it has been developed in the jurisprudence of the community property states, including California, affords no substantial basis for the hope that a renewal of the litigation on this subject in the Federal Courts would change the result."

The Attorney General in rendering his opinion promulgated as Treasury Decision 3138, discussed the Louisiana Statutes and decisions at some length and emphasized the fact that under the decisions the wife was not required to pay an inheritance tax on her one-half of the community estate, upon the death of her husband. The Attorney General also cited the decision by the Supreme Court of Idaho in the case of *Kohny vs. Dunbar*, (121 Pac., 544), and quoted therefrom as follows:

> "Since the interests of both husband and wife are the same and equal in and to the community property, and each takes one-half interest therein by will, it is clear to us that if the wife must pay an inheritance tax on her half of the prop-

THE 1942 AMENDMENTS

The Revenue Act of 1942 establishes a new and revolutionary method of taxing community partnership property at death. That Act abandons, as to community partnership property, and as to community partnership property alone, the test of ownership at death, as the controlling factor in measuring the tax. It purports to substitute therefor, as to community partnership property, and as to community partnership property alone, varying uncertain capricious, arbitrary and confiscatory tests, some applicable in one case, some in another.

Section 402(b) (2)[3] requires that the entire interest of both spouses in all community partnership property be included in the gross estate of the first spouse to die, with two exceptions only: (1), property received as or derived from compensation for personal services actually rendered by the surviving spouse; and (2), property derived originally from the separate prop-

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[2b]—(continued)

> erty upon the death of her husband, that the husband would likewise be obliged to pay an inheritance tax on his half of the property on the death of his wife. The law clearly places them both on an equality in this respect. This illustration, however, accentuates the unreasonableness of the contention, for no one claims that the husband is required to pay such tax on his interest in the community estate."

Similar expressions are contained in decisions by the courts of other community property states wherein it is universally held that only one-half of the community estate is subject to the State Inheritance Tax upon the death of one of the spouses. For instance, in *Jones vs. State*, 5 S. W. (2d) 973, the Texas Commission of Appeals with the approval of the Supreme Court implied that a construction of the State Inheritance Tax which would subject the whole community estate to such a tax upon the death of one of the spouses would render the statute unconstitutional, and said:

> "To impose the tax under such circumstances would be to visit the tax upon the real owner whose real right to the property has not been affected one way or the other by the death of a co-owner."

See also *Hansen vs. Blackmon, Collector*, 169 S. W. (2d) 955 (Texas Court of Civil Appeals); 169 S. W. (2d) 962 (Supreme Court of Texas.)

[3]See p. 3, *supra*, Appendix p. 1, *infra*.

erty of the surviving spouse.[4] Even as to these items of community partnership property, a minimum of one-half must be included in the decedent's estate, because of his or her power of testamentary disposition over one-half of all community partnership property.

Thus the statute by legislative fiat creates three categories of community property:

(1) The first category includes community partnership properties traceable to the husband's wages or to his separate property. If the husband dies first, all of such community partnership properties must be included in his estate, but if the wife should die first, one-half of these properties is includible in her estate;

(2) The second category includes community properties traceable to the wife's separate wages or to her separate property. If she dies first, all of such community partnership properties fall into her taxable estate; but if her husband predeceases her, one-half of such properties is taxed to his estate;

(3) The third and most important category, since it frequently comprehends the bulk of community partnership property, consists of all properties not directly traceable to the wages or separate property of either spouse.[5] As to the community property falling into this category, the full value is included in the estate of the first spouse to die. If the husband dies first, both halves are included in his "gross estate,"; if the wife dies first, both halves are included in her "gross estate."

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[4]As the Committee Report on the Bill shows, the excepted items include "(1) property acquired in exchange for separate property, (2) community income yielded by such property acquired with such income, and (3) property which may be traced back to property received as compensation, separate property, income from property received as compensation, or income from separate property." S. Rep. No. 1631, p. 231.

[5]See pp. 11 to 13, *supra*.

In the creation of three categories of community partnership property, the orthodox and well recognized constitutional rules of Estate Taxation are abandoned. The Constitutional right of each state to determine the ownership of property is abrogated and three different rules of taxation are prescribed, each to be applied depending upon the circumstances of the particular case.

1. The power of testamentary disposition is selected as the taxable event in certain cases. This may be termed the "minimum rule." A decedent is always taxed under the statute on all property over which he had a testamentary power of disposition. But this power of testamentary disposition is not the sole criterion of taxation. A decedent more often than not is taxed on property over which he had no power of testamentay disposition.[6]

2. The fact that the decedent created the estate is apparently made the basis for the tax in some cases, although here again, this is not the sole criterion.[7]

3. Neither of the foregoing tests of taxability are applicable in those cases where the property is not directly traceable to the separate wages or separate property of either spouse. This is the third category of community partnership property above referred to. The first spouse

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[6]For example, he has no power of testamentary disposition over, but is taxed on, his survivor's share of all property traceable to his own separate earnings or separate property and his survivor's share of all properties not traceable to the earnings or separate estate of either spouse, such as property acquired through community debt or through joint activity, or farming, merchandising and the like.

[7]When the property is directly traceable to the decedent's separate earnings, or to his separate property, and he dies first, the whole of the property is taxed to him; however, if the non-producing spouse dies, the power of testamentary disposition is made the test of taxability so that the non-producing spouse is always taxed on one-half of the property, even though the other spouse may be shown to have produced the same through his efforts. Moreover, in cases falling in the third category above, that is, cases where the property is not ascribable to the compensation or separate property of either spouse, the tax is laid on the whole estate, without regard to who produced it, who owned it, or who had the testamentary power of disposition over it.

to die is taxed on the whole, including the survivor's share, even though he had no power of testamentary disposition over it, and even though he was not the creator of the estate. We are left to conjecture as to the reason or excuse for the tax in such a case. Apparently, each is presumed, contrary to the law and the fact, to own outright the entire property. Cessation of management is not made a test of taxability,[8] the only mention of management of the community partnership being contained in Section 811(G) (4), dealing with life insurance policies.

Thus the statute represents a curious and arbitrary intermixture of disregard for, and regard of, State laws. The law of the State is recognized in determining the minimum taxable estate by the provision requiring inclusion of all property over which decedent possessed the power of testamentary disposition. The law of the State is entirely disregarded in determining the maximum taxable estate by the provision requiring the inclusion of the portion of the community partnership property belonging to the surviving spouse.

The effect of this statute, then, is: to disregard property rights; to tax one taxpayer with respect to the prop-

[8]The statute does not expressly make the cessation of management the excuse for the tax, and, in its operative effect, the statute does not lay the tax on the termination of management. In the case of the wife's prior death, the testamentary power of disposition is selected as the subject for the tax, even though the husband is the manager of her interest in the property. In Louisiana, the husband may have managerial control over his wife's separate earnings and the income from her separate property. Should she die first, the fact that she or her property originated his wealth and not the fact that her husband at that time was the manager, is made the occasion for the tax. In such a case, were the husband to die first, even though his management terminated over all property traceable to his wife's separate earnings or separate property, the statute would tax the husband's estate on his half interest only. Thus, the source of the property in such an instance becomes more important for estate tax purposes than cessation of management. Moreover, cessation of management is utterly disregarded in cases where the wife dies first and her estate is taxed on the whole property as in category 3 above. Cessation of management is not considered where, the management of the property is in the wife; as, for example, where, on a showing of lunacy or abandonment by the husband, the wife takes over administration of the entire estate.

erty of another; to tax him on property which he never owned, which he could not give away, could not and did not transfer at death and which he could never convert into his own separate property. It treats (that is, conclusively presumes) two separate persons as owning the same property at the same time. It makes the tax depend on the sheer accident of which of the two spouses may happen to die first.[9] After taxing the entire community partnership property to the first spouse to die, the survivor is required at his or her death, even though it follows immediately, to pay a second tax on his or her half of the property.[10]

This resume sustains the charge that the amended law applies varying, capricious, arbitrary and confiscatory tests to measure the estate tax laid upon community partnership estates—and upon such estates alone. Other factors reinforce this conclusion.

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[9]The storekeeper and his wife are both regarded as owning at the same time the entire business, including the interest of the other, and the first to die is taxed on the whole. A farmer and his wife are each considered as owning the whole of their lifetime savings, and the first to die is taxed on the whole. A man or wife may purchase securities on credit and pay off the debt with the income therefrom; yet each is considered as owning the whole and the first to die is taxed on the whole. In fact the bulk of all property in the community property states will be taxed to the first spouse to die, because most community partnership property is not derived from compensation or separate property of either spouse (see p. 19 *supra*) and that which is so derived usually cannot be traced to such source

[10]This second tax is applicable even though the surviving spouse dies within five years. Section 812(c) of the Internal Revenue Code, page Ap. 9, allows a credit against the estate tax for property which was within five years subjected to estate taxes in a prior decedent's estate; however, this credit applies only where the property "can be identified as having been received by the decedent from such prior decedent by gift, bequest, devise or inheritance." In a community partnership property state, the surviving spouse does not receive his interest by "gift, bequest, devise or inheritance." His interest was vested when the property was acquired; consequently, the credit is not available. In the case of a common disaster, the whole of the property might be taxed to both spouses simultaneously, and in any event, 150% of the value of the property would bear estate tax. Although the "previously taxed" section was amended in the 1942 Revenue Act, the right to the credit was carefully denied to the surviving spouse in a community partnership state. See Section 812(c), Revenue Act 1942, page Ap. 9. It is only in the community property states that this credit is denied.

The statute will completely confiscate many estates and frequently will deprive a man, after a lifetime of labor, of the right or opportunity to leave anything whatsoever to his children.[11]

Only one-half of community debts can be deducted, even when all community assets are included in the estate.[12] Not only is this grossly unjust, but it will materially increase the number of estates entirely confiscated by the tax.[12a]

If community property is given away, the husband may be treated as the owner of the property, and may

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[11]There is no statutory provision authorizing the decedent's executors to surcharge the surviving spouse's share of the property with any portion of the decedent's tax; comparable to the specific provision (Section 826(c), Internal Revenue Code, Page Ap. 10, authorizing the executors to collect from insurance beneficiaries. Section 411 (b) of the Revenue Act of 1942, Page Ap. 6, imposes a personal liability on the surviving spouse as a transferee, but Section 826 (b) Page Ap. 9, specifically gives the survivor a right of reimbursement. Complete confiscation may also result in case of a common disaster (see Footnote (10), *supra*) or large community partnership debts. For example, if a spouse dies possessed of a one-half interest in a net community estate of $6,000,000.00 in value, the estate tax deductible for his one-half interest, but measured by the whole would be $3,138,200.00, or $138,200.00 more than his entire estate. This would mean, in some cases, that a man's wife, even though estranged, would hold her property free of tax, but the husband would have nothing whatever to leave his devisees, even though they be children of a former marriage.

[12]This is because no change was made in the provision allowing deductions of claims against the estate, in determining the net taxable estate. Only the decedent's debts, that is, one-half of community debts are deductible. See: Section 812(b) Internal Revenue Code, Appendix P. 8.

[12a]In fact, under some circumstances, it will require a tax to be paid by an estate which would owe no tax but for the situation presented by the statute. For example, the only property belonging to a husband and wife is their respective interest in the community which exists between them. That community has assets worth $300,000.00 but owes debts amounting to $350.00.00. The community is therefore clearly insolvent yet, on the death of the spouse dying first the total community property, $300,000.00, would be considered as the base. From this would be deducted only one-half of the debts, to-wit, $175,000.00 leaving $125,000.00. From this would be deducted the $60,000.00 statutory exemption. On the remainder, to-wit, $65,000.00, estate taxes would have to be paid. Thus, estate taxes would have to be paid though in law and in fact the entire estate belonging to the deceased would be consumed by debts and the deceased would have left no net estate whatever.

be required to pay a gift tax on the whole community, even though the "gift" to the extent of one-half be to the wife of her own property, and even though, shortly before, she may have paid income taxes on the same property.[13] Thus, the husband may be regarded as the owner, due to pay a gift tax if a gift is made (Sec. 453); yet, if no gift is made and the wife dies, she is regarded as the owner, and her estate must pay estate taxes on the same property, always on one-half, and, more often than not, on the whole. (Sec. 402 (b) (2)). The arbitrary federal presumption created by this statute in contradiction of the state law determining ownership and, also the difficulty, and in most cases the impossibility, of doing the tracing which the act purports to permit will usually accomplish this unlawful and unjust result.

When life insurance forms all or part of the taxable estate, there is a veritable maze of confiscatory and capricious treatment under both the gift and estate tax laws. Laws of property and laws of insurance are utterly disregarded, and the revolutionary doctrine of dual ownership is prevalent.[14]

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[13]Under Section 453 of the Act of 1942, Appendix Page 6, *infra*, all gifts of community property are charged to the husband, unless the property is directly traceable to the wife's wages or separate property, an impossibility in most cases. If a gift is made of community partnership property in contemplation of death, the husband is regarded as the owner for gift tax purposes, and must pay the gift tax (Section 453). Yet if the wife dies, she is deemed to have made the gift, and must pay the estate tax, not on half of the property, but on the whole, in most instances. (See: Section 402, Revenue Act of 1942, Page Ap. 1 *infra*.) Similarly, if community partnership property is given away, the husband retaining a life income, he is treated as owner of the whole, and pays the gift tax (Section 453). But at his wife's death, she is deemed to have made the gift and her estate bears the tax on the whole. In neither case is the gift tax paid by the husband available as a credit against the wife's later estate tax. (See: Section 183 Internal Revenue Code.) It is only in the community partnership property states that this credit is denied.

[14]If, for example, the wife owns as her separate property a policy of life insurance on her husband's life and premiums are paid thereon out of partnership community funds, the husband must pay gift taxes on the premium payments, since they go to enhance the value of the separately owned property, even though the "gift" is, as to one-half, a "gift" to the wife of her own funds, and even though she may have

In certain cases, the husband will be regarded as the owner of the whole property, and, at his death, his estate will be required to pay the tax on the whole; and yet, contemporaneously, his wife will be regarded as the owner of one-half of the same property and required to pay a gift tax on that share along with the husband's estate tax on the whole.[15]

Where the marriage is dissolved by divorce or separation, the tax is levied as it would have been prior to the 1942 amendment. If death occurs one moment after separation or divorce, only one-half of the property is taxed to the decedent. If death occurs one moment prior to

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[14]—(continued)

paid an income tax on the same funds a few days previously. Yet, after having made the gift, the husband's estate, at his death, must pay an estate tax on the full proceeds of the policy owned by the wife and paid for in half by the wife's funds, on which the husband has paid gift taxes. Previously, insurance proceeds were included only to the extent that the decedent paid premiums on the policy so that, in the community partnership property states, only one-half of the insurance was taxable where the premiums were paid with community partnership funds. (*Lang v. Commissioner*, 304 U. S. 764; *DeLappe v. Commissioner* 113 Fed. (2d) 48 CCA 5th). But under Section 404 of the 1942 Act, Page Ap. 2, *infra*, premiums paid with community partnership funds are considered to have been paid by the insured, unless, again, such funds are traceable to the wages or separate property of the survivor. Similarly, if a husband in a community partnership state takes out a policy on his wife's life in his own favor, and pays the premiums from community partnership funds, her estate must pay tax upon the full policy proceeds, even though the policy is owned by the husband, and he pays for half of the cost.

[15]For example, a husband may undertake to dispose by will of both his and his wife's interest in community partnership property, thus putting his wife to an election. He might give his wife a life income in the whole with remainder to his children. Under the statute, he is regarded as the owner and his Estate must pay taxes on the whole. Yet, if his wife elects to take under the will, she is regarded as the owner of one-half and must pay gift taxes with respect to her one-half interest. The Treasury Department has consistently held that, where the wife elects under such circumstances, she has made an exchange of her interest in the community partnership property for the rights granted by her husband's will. The value of her life interest under the terms of the will is commuted to present worth by use of mortality tables and a 4% discount factor. Where the value of her half interest in the community partnership property, permitted by her to go under the will, exceeds the present worth of her life income under the will, the difference represents a taxable gift from her to the remaindermen. Thus, the same property is both taxed to the husband's estate, as assumed owner, and to the wife for gift tax purposes as owner.

separation or divorce, the whole may be taxed to the first to die.[16] This is perhaps the first time in history that a statute encouraging divorce or permanent separation has been passed.[17] Where the spouses move to a non-community property State, and there invest the community partnership property brought with them, the law, upon the death of either, will regard the first to die as a tenant in common owning only one-half of the property, and limit the tax accordingly,[18] whereas, if they remain in the community partnership property State the whole will generally be taxed to the first to die.

Thus one rule of taxation is applied in the community partnership property States, and another rule, re-

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[16]Section 402 (b) (2) applies only to property held as community property. After separation or divorce, even if there is no partition in kind, the property is held as tenants in common and not as community partnership property.

[17]The temptations to wealthy persons to separate or divorce in order to conserve some of their estate for their children is made apparent by the following: A community estate is $6,000,000.00; under the estate tax law, all of it may be taxed to the first to die, such tax to be $3,128,200.00. The second to die must then pay the tax of approximately $1,263,200 on his one-half interest. Thus the total tax on the death of the two spouses exceeds $4,300,000.00. By permanent separation or divorce, there will be at the death of the two spouses two taxes of approximately $1,200,000.00, or a total of $2,400,000.00, a tax saving achieved by separation of partnership property or divorce of approximately $2,000,000.00.

[18]The law of a new domicile will not recognize the community partnership contact, but it will recognize that the property acquired in Louisiana, or some other commmunity partnership property State, is owned one-half by each spouse, as tenants in common, and the husband will be considered as Trustee of the wife's one half, and be accountable to the wife. (*Depas v. Mayo*, 11 Mo. 314, *Phillips v. Commissioner*, 9 B T A 153, *Succession of Popp*, 146 La. 464, 83 South 765, Solicitors Opinion 121, *Internal Revenue Bulletin*, Dec. 1921, Page 197; *Restatement, Conflict of Laws*, Sections 292 and 293. We have the arbitrary and amazing situation of Congress attempting to fix property rights in only the community partnership states for taxation purposes in the very teeth of the law of the states involved, when, if the same property is removed to the other states of the Union, these latter states recognize the law of Louisiana and the property rights of the spouses, and Congress, following the law of the common law states, taxes the former community partnership husband and wife on the very basis that they would and should have been taxed on if the community property estate tax amendment had not been adopted. In short, Congress continues to recognize for estate tax purposes the law of common law states which recognize in common law terminology the law of Louisiana, but when dealing directly with Louisiana citizens and the same property, the Louisiana property law will be disregarded.

specting the **same spouses** and the **same property,** is applied in the other States.

On the other hand, spouses residing in non-community property states may accumulate community estates there under an ante-nuptial contract, the only difference being that a conventional instead of a legal community is established, within the meaning of those terms as applied to community estates. See *Neves vs. Scott,* 9 Howard (U. S.) 196, *LeBreton, Executor vs. Miles,* 8 Paige (Chancery) 261, *Decouche vs. Savetier,* 3 Johnson (Chancery) 190. *Compare Castro vs. Illies,* 22 Texas 479, where the conventional community partnership established in France, was held not to control as against the legal community partnership existing under the laws of Texas upon removal of spouses to that State.

Since no tax is imposed on the survivor's half of the community partnership property transposed by spouses moving to a non-community property state, the same rule would apply to conventional community partnership property created by contract of spouses in non-community property states. Hence it would develop that under the 1942 Act, what is in reality community partnership property in a common law state, although not technically defined as such, would be accorded the same recognition taxwise as was accorded to all community property prior to the passage of that Act, whereas community property in community states would for the first time be taxed otherwise.

The power of spouses domiciled in a common law state to establish a community partnership by ante-nuptial agreement is discussed and recognized in *McKay's Community Property,* (Second Edition) Section 142 The difference between conventional and legal community of property is discussed in the textbook by

deFuniak on *"Principles of Community Property"*, at Section 54. deFuniak, in his work on Community Property, also says:

> "There can be no more justification for Congress saying that such an inherent principle of the law of the community property states shall be ignored and the income considered as separate property of the one earning it than there would be for Congress declaring that for purposes of taxation it will ignore the law of non-community property states and consider all earnings of one spouse as belonging equally to both." (Section 255, at page 719).

The estate tax statute, as amended, creates different rules of income taxation applicable to sales of community partnership property after death than are applicable to similar properties in other States.[19]

It is apparent, therefore, that Section 402(b)(2) applies varying, capricious, arbitrary and confiscatory tests to measure the estate tax laid upon community partnership estates, and upon such estates alone. It is (1) wholly capricious, arbitrary and violative of due process of law, and (2) offends the geographical uniformity provisions of the Federal Constitution.

II.

Section 402(b) of the Revenue Act of 1942 is so arbitrary and capricious that it violates the Due Process Clause of the Fifth Amendment; considered from the standpoint of State action, the State statute violates the due process clause of the Fourteenth Amendment to the Constitution of the United States.

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[19] If community partnership property is sold after the death of one of the spouses, the basis for determining the gain or loss is the value at the date of death of the decedent's one-half interest, and the original cost of the survivor's one-half interest. *Sec.* 113 (*a*) (5) *Internal Revenue Code, p. Ap.* 10 *infra.* The result is that, if community partnership property which has enhanced in value after its acquisition

The statute, as amended by Section 402 (b) of the Revenue Act of 1942, clearly violates the principle announced in *Hoeper v. Tax Commission*, 284 U. S. 206, that "any attempt * * * to measure the tax on one person's property * * * by reference to the property of another is contrary to due process of law." This Court, in the *Community Property Cases* (282 U. S. 101, 118, 122, 127, 792) clearly recognized that the wife is a full and equal owner with her husband in community partnership property. The Court below pointed out that the surviving wife "is the half partner and owner of all acquisitions made during the existence of the marriage." In *Poe v. Seaborn*, 282 U. S. 101, this Court recognized that "the powers of partners, or of trustees of a spendthrift trust, furnish apt analogies." The opinion below points out that "there is no substantial difference between her (the wife's) interest therein and the interest of an ordinary member of a limited or ordinary partnership, the control and management of whose affairs has, by agreement, been entrusted to the managing partner." (R. 29).

Therefore, this statute violates the principle above announced, in that it measures the tax on one persons's property by reference to the property of another, just as it would violate due process to tax one partner at death on the surviving partner's interest, or to tax a trustee at death on his beneficiary's property, where such trustee never at any time owned or at his death had any economic interest in the trust properties. Since "there is no substantial difference", the statute, in measuring the tax of the first to die by the full value of the surviving spouse's interest, lacks due process.

19—(continued)
is sold after the death of one of the spouses, a taxable profit results from the disposition of the survivor's one-half interest, despite the fact that the decedent's estate may have paid an estate tax on the entire property at the value at which it was sold. The rule in other States is that property sold after death carries as its basis for gain or loss the fair market value at the decedent's death.

The following statement from this Court's decision in *Heiner vs. Donnan*, 285 U. S. 312, is apposite:

> "The result is that upon those who succeed to the decedent's estate there is imposed the burden of a tax, measured in part by property which comprises no part of the estate, to which the estate is in no way related, and from which the estate derives no benefit of any description. Plainly, this is to measure the tax on A's property by imputing to it in part the value of the property of B, a result which both the *Schlesinger* and *Hoeper* cases condemn as arbitrary and a denial of due process of law. Such an exaction is not taxation but spoliation. 'It is not taxation that government should take from one the profits and gains of another. That is taxation which compels one to pay for the support of government from his own gains and of his own property.'"

And, as aptly remarked by Judge Learned Hand in *Frew v. Bowers*, 12 Fed. (2d) 625, 630 (C C A 2):

> "Such a law is far more capricious than merely retroactive taxes. Those do indeed impose unexpected burdens, but at least they distribute them in accordance with the taxpayer's wealth. But this section distributes them in accordance with another's wealth; that is a far more grievous injustice."

See also *Lewellyn v. Frick*, 267 U. S. 487.

The statute here is much more capricious and much more arbitrary than the statutes considered in any of the foregoing cases. As shown above, it adopts wholly arbitrary and confiscatory tests, applicable only in the community partnership property States. It not only measures one person's tax by another's property, it treats two persons as owning at the same time the same property; it completely disregards States rules of property and

applies one rule of taxation when one spouse dies, and another rule when the other dies. It makes the incidence of the tax depend on the sheer accident of which of the two spouses should happen to die first. It creates double taxation and will completely confiscate many estates.

The statute is also unconstitutional because it creates wholly arbitrary and capricious presumptions contrary to both law and fact. As stated above, the bulk of community partnership property on hand at the death of either spouse will constitute partnership property not directly traceable to the wages or separate property of either spouse.[20] Thus, in the majority of cases, the statute, by taxing the full value of property to the first spouse to die, creates the wholly arbitrary and capricious presumption that the first spouse to die owned the whole of the community partnership property. (Louisiana Civil Code, Article 2405, Appendix pp. 13 *infra*). The fact, controlled by local law, is directly to the contrary. The property is owned one-half by each spouse. Such a presumption is contrary to the facts in this case. Where community partnership property is acquired through the creation of a community partnership debt, or where a storekeeper and his wife build up an estate through their joint efforts, or a farmer and his wife through their joint efforts till the soil, it is utterly contrary to the fact, even if economic contribution were the controlling factor, to say that the entire community partnership property is owned by the first spouse to die; that it is owned entirely by the husband, should he die first, and that it is owned entirely by the wife, should she die first. There is certainly no rational connection with the real facts and the facts presumed. (*Tot v. United States*, decided June 7, 1943, 87 L. Ed. p 1119). As stated by the Court in *Bailey v. Alabama*, 219 U. S. 219, "A constitutional prohibition

[20] See pp 11-13 *supra*.

cannot be transgressed indirectly by creating a statutory presumption any more than by direct enactment." See also *Manley v. Georgia*, 279 U. S. 1, 5-6. Certainly, the presumption in this case that two persons at the same time own in its entirety the same property is much more capricious, arbitrary and unsupportable than the two-year presumption, declared invalid in *Heiner v. Dannon, supra*, and even the six-year presumption invalidated in *Schlesinger v. Wisconsin*, 270 U. S. 230. See also *Hall v. White*, 48 F (2d) 1060; *Guinzberg v. Anderson*, 51 F (2d) 592; *American Security Company et al.*, 24 B T A 334; *State Tax Commission v. Robinson's Executor*, 234 Ky. 415.

No one would suppose that Congress could retroactively impose an estate tax with respect to an irrevocable outright gift of property made by the decedent to a member of his family, where such a gift was neither in contemplation of, nor intended to take effect in possession or enjoyment, after death. (*Nichols v. Coolidge*, 274 U. S. 531). This statute does even more than this. It undertakes to ascribe significance to the origin of wealth without regard to the ownership of property at origin or at death.[21] It undertakes to tax an individual merely because his action gave rise to that wealth, although at the time of its acquisition he did not own the property and, at the time of his death, he possessed no economic interest therein. Indeed, this statute contains all the pernicious elements of a retroactive law. For the first time it undertakes to make the estate tax depend on the source of funds used in acquiring property many years prior to death. It

[21] This attempt by the statute to attribute importance to "compensation for services actually rendered" by one spouse or the other is, of course meaningless, since under community property law, community property is not earned or derived by the spouse whose services may have preponderated in producing it, but by the community. As this Court said in *Poe v. Seaborn, supra*: "But here the husband never had ownership. That is in the community at the moment of acquisition."

imposes upon spouses in the community partnership property States the impossible burden of tracing back through the many transactions of a long lifetime the origin of each item of property on hand at death. Unless this origin is traced into the separate earnings or the separate property of the survivor, the estate of the decedent must pay the tax on the whole. (Even if a successful tracing to the survivor could be accomplished, the decedent's estate must, nevertheless, pay the tax on half). Never before has it been intimated that husband and wife must between themselves maintain accurate records of their individual transactions. This statute then takes them entirely by surprise and by reaching back and attaching tax significance to methods by which property was acquired many years prior to death, it contains all of the unjust elements of a retroactive tax. *Cf. Frew v. Bowers*, 12 F. (2d) 625, 630, and see *Stone, J.* dissenting in *Heiner v. Donnan, supra*, 285 U. S. 312.

As stated in *Nichols v. Coolidge, supra*, "Under the theory advanced for the United States, the arbitrary, whimsical and burdensome character of the challenged tax is plain enough. An excise is prescribed, but the amount of it is made to depend upon past lawful transactions not testamentary in character and beyond recall."

The statute cannot be supported on the basis that economic benefits were shifted by death. True, at the husband's death, there is frequently a shift in management." But the summary of the rights held by the wife, when contrasted to the limited, restricted and circumscribed agency powers of the husband (pages 13-15 *supra*)

"But there is no such shift where the wife is the manager, as in Texas, of property acquired with her separate earnings or with income from her separate property; or where by virtue of ante-nuptial contract, the wife is made manager of the community, or where, in the case of abandonment or lunacy, the wife becomes manager of the community.

is sufficient to show that the husband's death confers no real or substantial economic benefits on the wife with respect to that one-half interest in the partnership property, which she has always owned. Under the Louisiana law, the wife, by not contracting otherwise, voluntarily selects her husband as the manager of her business affairs and her half of the community partnership property. It is difficult to understand how her husband's death can be said to be an economic benefit to her in any sense of the word. She loses the business manager she voluntarily selected by contract. Her husband's death is a disaster, not a benefit. Certainly no one would suppose that a statute which undertook to tax a trustee at his death on the value of his beneficiary's property, or to tax an agent at his death on his principal's property or to tax a managing partner of a partnership at his death with his partner's interest in such partnership, comported with due process. Something more than mere management must pass. There must be some shifting of economic interest in the whole property to justify an estate tax measured by the whole of that property. It will not do to select one straw from the bundle of rights that go to make up ownership (when that straw is so unsubstantial that it may be changed as often as State law-makers see fit, or by contract, or otherwise, without affecting ownership), and to tax that straw on the basis of the value of the whole. That the tax must be measured by the shifting of real economic benefits as distinguished from mere agency or trust powers is shown by the decision of this Court in *Reinecke v. Northern Trust Co.*, 278 U. S. 339, where the Court spoke through Mr. Justice Stone, saying: "Nor did the reserved powers of management of the trusts save to decedent any control over the economic benefits or enjoyment of the property. He could equally have reserved all these powers and others

had he made himself trustee, but the transfer would not for that reason have been incomplete. The shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made." So, in this case, the economic interest was the wife's from the moment the property was acquired. It was complete at that time and did not pass at the husband's death upon the mere cessation of his management.

In *Warburton v. White* 176 U. S. 484, and *Arnett v. Reade*, 220 U. S. 311, this Court distinctly held that the management and control of the husband in a community partnership State is not property, but that the wife's half interest in community partnership property is an absolute property interest protected by the Fourteenth Amendment. By these cases, this Court conclusively established that under the Federal Constitution a husband, having by state law the management and authority to dispose of community partnership property, may be deprived of that statutory agency by subsequent State statute without compensation. Conversely, this Court there held that the wife having a half interest in community partnership property cannot be deprived of that half interest by change of local statutory law, whereby the husband is given the power of management. Therefore, it is manifest that the 1942 Statute apparently undertakes to tax as property that which this Court holds is not property, namely, the husband's power of management, and refuses recognition to that which this Court holds is property, namely, the wife's vested ownership of one-half of the community partnership property.

Moreover, as we have pointed out above,[**] the statute, neither in terms or in operative effect, is directed at

[**] See footnote 8 p. 21 *supra*.

cessation of management. In most cases where the wife is the first to die and where she is taxed on the full value of the community estate including her husband's one-half interest therein, there is not even the cessation of bare management at her death. She had no management of either half interest prior to her death. After her death the husband continues to manage his half interest. In all such cases there is not even the shifting of bare management of the husband's share of the property. Yet his share is included in the tax imposed upon the wife's estate."[**b]

We submit that the statute clearly offends the Due Process Clause of the Fifth Amendment; to permit Louisiana to enforce its claim for an additional tax predicated upon this statute would violate the Due Process Clause of the Fourteenth Amendment.

III.

The statute cannot be justified in the Tyler, Jacobs or Moffitt Cases

The Committee reports show that reliance, as to the constitutionality of the statute, was placed upon the *Tyler* case, 281 U. S. 497 (Estates by Entirety), and the *Jacobs* case, 306 U. S. 363 (Joint Tenancy). But these cases do not support the amendment. The statute involved in those cases concerned transfers by the decedent, either mediately or immediately, to his wife or to others as a tenant by the entirety or as a joint tenant with him. It dealt only with property which had originally belonged to the decedent. It dealt with such property only when

[**b]In this aspect it would seem that the tax is not an excise at all, since nothing happens with respect to the survivor's property that can be made the excuse for a tax. Yet the survivor's property is used as a measure for the tax. The tax is, therefore, a property tax disguised as an estate tax, and being a property tax, is a direct tax not apportioned between the States and, therefore, unconstitutional.

the decedent in his lifetime had made a transfer thereof by gift or without consideration, retaining the right of survivorship always attached to such estates. This particular statute had been adopted to stop loop-holes and prevent estate tax avoidance. Thus, in the cases the Committee erroneously relied upon, the Court had before it merely the question of including in the decedent's estate a gift by the decedent, which did not ripen into a complete gift until his death. The transfer was to take full effect in possession and enjoyment only on death. By gift, the decedent had created an estate which, if his joint tenant died first, would return in full to him and which required his prior death to confer on his donee the full possession, use or enjoyment of the property. Thus, the statutory provisions dealing with joint tenancy and tenancy by entirety were directed at, and reached, transfers testamentary in character, in which substantial economic rights were retained in the donor for his life. The decisions in the *Tyler* and *Jacobs* cases are based upon three grounds, none of which apply in the case of community partnership property."[*]

I. Death resulted in enlarging the survivor's property rights in all property used to measure the tax. Until such death, the survivor was not the complete owner of any share of the property; the legal rights of the decedent reached every part thereof. Death, therefore, became the generating source of important and definite accessions to the survivor's property rights. In contrast, the death of a community partnership spouse does not generate added property rights in the survivor's one-half of the property. If the wife should die first, nothing, even in

[*] "In the *Estate of Rogers v. Helvering*, decided December 6, 1943, Mr. Justice Frankfurter, speaking for the majority of the Court, said, "For the purpose of ascertaining the corpus on which an estate tax is to be assessed, what is decisive is what values were included in dispositions made by a decedent, values which but for such dispositions could not have existed."

the nature of management, passes from the dead to the living with regard to her surviving husband's share of the property. Yet the wife's estate, in most instances, is subjected to a tax on all of the husband's share. When the husband dies first, the only rights devolving upon the wife are the bare managerial rights over her property theretofore held by her husband. These are not substantial rights in any economic sense. A shift in the power to manage property may not be made the occasion of a tax measured by the value of that property.

2. In the Tyler and Jacobs cases, all of the property came mediately or immediately to the tenancy as a pure gift from the decedent. Manifestly, this is not true of community partnership property. The character of community attaches to the property at the moment of acquisition and not because of a gift or the voluntary choice of either or both husband and wife.

3. In the *Tyler* and *Jacobs* cases, the statute (there dealt with) was a means appropriate to the legitimate aim of Congress of preventing tax avoidance, in whole or in part, by *inter vivos* donation of the property of one to another. This was a just basis for the decisions, but it has not the remotest application to community partnership property.

Nor is *Moffitt v. Kelly*, 218 U. S. 400, relied on by the Government below, in anywise controlling. In that case, this Court sustained a California inheritance tax levied at the husband's death upon his wife's community interest therein as against the claim that such tax offended the Due Process Clause of the Fourteenth Amendment. There the Court held that the State had the power, not limited by the Fourteenth Amendment, to select as the subject for taxation the cessation of the husband's pos-

session and enjoyment at his death, even though the wife's interest therein might be deemed to be "vested". It should be observed that the law under consideration was a State, not a Federal, statute; and that the case arose at a time when the law of California fell short of being a community system of the type always prevailing in Louisiana, and now prevailing in California. At that time, as the decisions of this Court in the *Robbins* (269 U. S. 315) and *Malcolm* (282 U. S. 792) cases, and of the 9th Circuit in *Wardell v. Blum* (276 Fed. 226) show, the wife had no real vested interest and no real ownership in one-half of the property. She had an expectancy, and this expectancy was "vested" in the sense that the husband could not disinherit her. But the wife was not an equal owner with the husband, and she had no power of testamentary disposition over any part of the community if she died first. The property was the husband's whether she lived or died, subject only to the provision that he must leave her one-half at his death. The *Moffitt* case, therefore, does not sanction and approve a statute of the kind here under consideration. The State Inheritance Tax Law in question did not, as does the Federal Estate Tax Law here involved, undertake to treat the husband and wife as if each owned all of the property at the same time. It did not attempt to tax the first of the two spouses to die on the whole property. It did not make the tax depend on the sheer accident of which spouse died first. It did not provide for taxing the wife at her death on any part of the property because under the California law, as it then was, the wife did not own any interest in the property and had no power of testamentary disposition over same. The statute there did not at once recognize and ignore the property rights of the two spouses. The statute there did not create presumptions, contrary to law and to fact, that both hus-

band and wife at the same time owned all of identical property. Consequently, the *Moffitt* case in no wise puts the stamp of approval on a statute of the kind here under consideration. It is true that the Court in its decision stated that the State could select as the subject for taxes the cessation of the possession and enjoyment of the property at the husband's death, even though under California law her expectancy was vested in the sense that he could not disinherit her. But this does not mean that the Federal Government could select as its subject for taxation the bare cessation of management where ownership was vested in another, nor did the Court there so decide. There is a difference between the cessation of possession and enjoyment, i. e., a cessation of property interest, and a bare cessation of management of property belonging to another. The *Moffitt* case certainly did not hold that Congress could make the bare cessation of management of another's property the occasion for an estate tax.

Assuming that a State might under the Fourteenth Amendment select such a subject for taxation, this would not mean that the Federal Government could without violating geographical uniformity,[22d] select such a subject for taxes in certain States only. Moreover, it has been shown that the Estate Tax Amendment of 1942 does not make the bare cessation of management the subject of the tax. The statute makes no reference to the cessation of management as the occasion for taxation. On the contrary, it adopts the power of testamentary disposition as the occasion for the tax in certain cases; the origin of the wealth as the occasion for the tax in other cases; and creates the wholly insupportable presumption of dual ownership of the entire property as the rule of taxation in most cases. Thus, the *Moffitt* case in no aspect can be regarded as supporting the tax in question.

[22d] See p. 41 *infra*.

IV

Section 402 (b) is Lacking in Geographic Uniformity.

Not only does the statute, as amended by *Section* 402 (b) of the 1942 Act, violate due process, but it offends the Constitutional requirement that all excise taxes be uniform throughout the United States. (Article I, Sec. 8, Clause 1 of the Constitution). This uniformity provision refers to geographical and not to intrinsic uniformity. (*State of Florida v. Mellon*, 273 U. S. 12; *Crooks v. Harrelson*, 282 U. S. 55; *Knowlton v. Moore*, 178 U. S. 41). It prohibits the "levying of duties imposed or excised upon a particular subject in one state, and a different duty imposed or excised on the same subject in another state," and it does require that **"whatever plan or method Congress adopts** for laying the tax in question, **the same plan or method must be made operative throughout the United States,"** and that **"wherever a subject is taxed anywhere, the same must be taxed everywhere throughout the United States, and at the same rate."** (*Knowlton v. Moore, supra*).

The 1942 Amendment does not make operative "the same plan" or "the same method * * * throughout the United States." It does not tax the same subject "everywhere throughout the United States."

The Federal Estate Tax Law is an excise on the privilege of passing property at death. (*United States Trust Company v. Helvering*, 307 U. S. 57). (*Landman v. Commissioner*, 123 Fed. (2d) 787 CCA 10) (*Porter v. Commissioner*, 288 U. S. 436, 444) (*Knowlton v. Moore*, 178 U. S. 41, 56).

By its general plan the tax is imposed "upon the transfer of the net estate of every decedent" **(Section 810 Internal Revenue Code)** and the property subject to the

tax is limited "to the extent of the interest therein of the decedent at the time of his death." **(Section 811 (a)).** Thus, the plan is to impose a tax upon the "transfer" of property at death measured by the value of the decedent's interest in such property."* The "subject" of the tax is this privilege of transfer by death. This was the subject of the tax in the community partnership property states until the passage of the amendment in question. This amendment adopted a new plan and selected new subjects of taxation in the community partnership property states, leaving undisturbed the original plan and the original subjects of taxation in all other states.

The amendment, by its terms, is addressed only to community partnership property held "under the law" of the community partnership states. It has no operative effect in other states. It is apparent from the analysis that we have given above (pp. 18-29, *supra*) that the plan or method laid down for community partnership states is not the same as the plan or method prescribed for the rest of the Union. It is likewise ap-

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*The only exceptions to the plan of limiting the tax to property beneficially owned at death by the decedent are: (1) transfers in contemplation of or intended to take effect in possession or enjoyment at or after death, including transfer where possession, use, enjoyment or income is reserved for the decedent's lifetime (Sec. 811 (c)). (2) Transfers where the decedent reserved power to amend or revoke a gift (Sec. 811 (d)). (3) Transfers by decedent to his wife or a third party of an estate by the entirety or joint tenancy (Sec. 811 (c)). In each case the *inter vivos* transfer is specifically includible only if the decedent originally owned the property and he made or caused the transfer to be made donatively and without consideration.

And in each case the *inter vivos* transfer must be donative or testamentary in character (e. g., transfers in contemplation or to take effect at death) or such as would not serve finally to vest the property in possession or enjoyment until the transferor's death (e. g.), joint estates with survivorship, revocable trusts). In each instance, a specific statutory provision was enacted to prevent tax avoidance. These serve to emphasize the basic character of the tax as an excise on the privilege of passing property at death.

In the *Estate of Rogers v. Helvering*, decided December 6, 1943, Mr. Justice Frankfurter, speaking for the majority of the Court, said, "For the purpose of ascertaining the corpus on which an estate tax is to be assessed, what is decisive is what values were included in dispositions made by a decedent, values which but for such dispositions could not have existed."

parent from the express terms of the statute that the subject of the tax is different in these states from the subject of the tax in the other states of the Union.

(a) In all other states the general plan of taxation is to tax the transfer of the decedent's interest in the property, that is, his ownership thereof at death. In the community partnership property states, ownership of property is entirely disregarded, and the decedent is taxed with respect to property which he never owned and which he could not transfer at death.

(b) It is only in the community partnership property states that significance is given to the origin of the property. In the other states, the fact that a decedent created wealth is not made the occasion for a tax if he did not own the property at his death.[23] But in the community partnership property states the mere fact that the decedent created the wealth is alone sufficient to tax him on the entire property, even though at his death he owned only half thereof.

(c) It is only in the community partnership property states that a presumption is adopted to the effect that a man and wife shall both be deemed at one and the same time to be the owner of all of the same property (i. e., that both are presumed to be the owners of the other's property), and that both are taxed on the other's property, and the tax made to depend on the sheer accident of which spouse may happen to die first.

(d) It is only in the community partnership property states that a bare cessation of management over property administered for another is apparently made the occasion for the tax. In the other states, the death of a partner, though he be the managing partner, does not result in the inclusion of his surviving partner's interest

[23]See preceding footnote.

in his taxable estate. In the other states, the death of a trustee does not result in an estate tax on such trustee's estate measured by the beneficiary's property. But as to the community partnership property states, the statute provides that the managing partner of the connubial partnership may be taxed on the survivor's share, and the husband, as fiduciary, may be taxed at death on property held beneficially by him for his wife.

(e) Not only is uniformity denied because property rights (in the surviving spouse) are subjected to the tax, while essentially identical rights (in the surviving spouse) in non-community property states go free; it is even more flagrantly denied in the respect that while denying reality to the wife's rights in those cases where conceding their substantiality would result in exemption, the statute concedes their substantiality where the concession results in additional taxation.

Thus, if the husband should die first, the full community partnership estate is, more often than not, made the measure of the tax, thus disregarding the wife's half interest in such property. But, where the wife dies first, at least her half interest, being the property of which she has the testamentary disposition, is subjected to the tax. Thus the statute attaches consequence to ownership only when the concession results in taxation, but denies it in the converse case. In no other case, and in no other part of the Union, save in the community partnership property states, does the law concede or deny the existence of property rights solely for the reason that concession or denial enriches the Treasury in the particular case. In capriciously denying, or capriciously insisting upon the reality of the wife's interests according to the effect upon the revenue, the 1942 Act departs from the principle of uniformity, since the locale to which these discriminations

are limited is the community partnership property states, and there are no comparable provisions applicable elsewhere.[23a]

It is not contended that excises imposed by Congress must be of such a character that they actually produce revenue throughout the Union. The only requirement of the Constitution is that they must operate impartially wherever conditions are such as to bring them into effect. Thus, the rule of geographic uniformity does not prevent Congress from placing an excise tax upon tobacco, notwithstanding the fact that tobacco is growing in only a few states (*Edye v. Robertson*, 112 U. S. 580). But in the present case, it is not true that the subject matter of the tax is found only in certain states. On the contrary, it is true that there are comparable, even identical, relationship and situations elsewhere, which, because of the admitted and purposeful territorial limitations of the Act, are not subjected to the tax, thus making geographic uniformity impossible.

As the Court below pointed out, there is no substantial difference between the wife's interest in the community partnership and the interest of an ordinary member of a limited or ordinary partnership.[23b] As this Court

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[23a] Consider the case of domiciliaries of Louisiana moving to a common law state, Footnote 19, *supra*. That state will recognize the common ownership of their property, although their property is no longer "community property". At death they will each be taxed on his or her half only, whereas, if they remained in Louisiana the whole would have been taxed to the first to die. A different rule of taxation is prescribed, therefore, with respect to the same persons and the same property merely because of the locale.

Consider also the case of domiciliaries of common law states wherein spouses are permitted to make contracts establishing community ownership as set forth on page 27. The Dominion of Canada Succession Duty Act makes no similar discrimination against spouses holding property under the community laws of the Province of Quebec.

[23b] Article 2807 of the Louisiana Civil Code, when considered in the light of the Louisiana jurisprudence and the other articles of the Civil Code is not inconsistent with the partnership analogy, but is merely explanatory of the difference between the *marital or community partnership* and *ordinary partnerships* in Louisiana. This

observed in *Poe v. Seaborn, supra*, "powers of partners or trustees of a spendthrift trust furnish apt analogies." There may be some formal and technical differences, but the question here is: Are these differences of such weight or importance that consequences so divergent may be applied to their transfer at death.[24]

[23b]—(continued)

article provides that "the community of property created by marriage is not a partnership; it *is the effect of a contract governed by rules prescribed* for that purpose in this Code". This article is found under Title XI of the Louisiana Civil Code dealing with ordinary and commercial partnerships. The statement that the community is not a partnership, when read in the light of the two parts of the Code, was merely intended to indicate that the community partnership was not the kind of ordinary commercial partnership dealt with and regulated by the articles under Title XI, but was governed by somewhat different rules and articles, namely, the rules and articles governing the community partnership or "legal partnership" contained in Section I, Chapter III, Title VI of the Louisiana Civil Code. The few Louisiana cases, (*Succession of Boyer*, 36 Louisiana Annual 506; *Baird v. Lemee*, 23 Louisiana Annual 424, *Mackenroth v. Pelke*, 171 Louisiana 842, 132 So. 365), citing Article 2807 of the Louisiana Civil Code refer to the article only in support of holdings that certain rules and articles of the Louisiana Civil Code applicable to ordinary partnerships do not apply to the community partnership which is regulated by different rules and articles. On the other hand, numerous articles of the Louisiana Civil Code dealing with the community partnership, and many decisions of the Supreme Court of Louisiana refer to the community of acquets and gains as a *community partnership*, and point out that the community partnership is more analogous to an ordinary commercial partnership than any other legal relationship. For example, in *Childers v. Johnson*, 6 Louisiana Annual 634, at page 641, the Supreme Court of Louisiana, in dealing with a case where community funds acquired after marriage had been used to pay a debt incurred by the wife prior to marriage, said:

> "This partnership, the intervenors, who are creditors of the community, have a right to consider as a legal entity; *like other partnerships*, it must be contemplated as an ideal being, *etre moral*, distinct from the persons who compose it, having its rights and its obligations, its assets and its liabilities, its debtors and its creditors. Mrs. Patton is not the debtor of her husband for the $2,000.00 expended for her benefit. She is the debtor of the community. She owed this debt before her marriage. The community derived no benefit from its creation. Instead of paying it with her own money, it has been paid with money of the community. * * * Is she permitted thus to enrich herself, at the expense of the community, and of *bona fide* creditors of that community? Clearly not. This results from that general principle *applicable to all partnerships*, which is, that a partner must account to the partnership for what he has drawn from it for his individual business and advantage. * * * "

[24]Consider, for example, an actual case where the wife died first and *all* of the community was included by the taxing officers as a part of her gross estate, and a deficiency demanded on that account

No Court has been more firm than this Court in insisting that taxation is a practical matter. (*Helvering v. Horst*, 311 U. S. 112). We are admonished that "taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed,—the actual benefit for which the tax is paid" (*Corliss v. Bowers*, 281, U.S. 376, 378 (1930); *Estate of Hanford v. Commissioner*, 308 U.S. 39, 43 (1939). See also *Helvering v. Clifford*, 309 U. S. 331 (1940); *Harrison v. Schaffner*, 312 U. S. 579 (1941); *Griffiths v. Helvering*, 308 U. S. 355 (1939)). The subject of death duties, as of gifts, has "come to be identified more nearly with a change of economic benefits than with technicalities of title" (*Burnet v. Guggenheim*, 288 U. S. 280, 287 (1933)). Unless "technical distinctions" (*Chase National Bank v. United States*, 278 U. S. 327, 336 (1929), and "attenuated subtleties"

24—(continued)

from her executor. These spouses, soon after marriage, purchased on credit a tract of land. This land was community partnership property. They farmed it, each actually doing physical labor in planting and harvesting crops. They prospered, paid for the land, bought other lands, and ultimately accumulated a substantial estate, without either ever having at any time any separate property, and without either having received anything whatsoever as compensation for personal services; but with each making a substantial contribution in direct labor to the acquisition of each community asset. When the wife died, all property was taxed as a part of her gross estate; when the husband dies, one-half of the same property will be taxed as a part of his estate.

To determine the geographic uniformity of this tax, contrast it with the tax which would have been levied had these spouses resided in a non-community property state and had taken title to the properties acquired as joint tenants, tenants by the entirety, or *as partners*. In neither case would the estate of the spouse first to die have been required to pay a tax measured by more than one-half of the jointly owned property. Yet it is clearly not true that there would be any greater enhancement in the managerial or proprietary rights of the surviving spouse in the other one half of the jointly owned property in the community partnership property state than there would be in the non-community property state. The contrary is clearly true in the case of joint tenancies and tenancies by the entirety. In short, the lesser increase in purely managerial rights, if in fact there is any increase at all, is made the occasion for an increase in tax liability solely because the taxables and property are located in community partnership property states; while corresponding or greater increases in managerial and proprietary rights when the taxables and property are located in non-community property states *are not made the occasion for any increases in tax liability.*

(*Lucas v. Earl*, 281 U. S. 111, 114, (1930)) are to be again raised to a regard from which they have fallen, it must be concluded that the 1942 Act operates in non-community property states with results which are vastly different from those which are attendant upon it in community partnership states, and are discriminatory against the latter. To uphold the contrary is to place reliance upon "elusive and subtle casuistries" possessing "no relevance for tax purposes"; which are presently—and rightly—in such ill repute (*Helvering v. Hallock*, 309 U. S. 106 (1940)).

The Committee reports state that, in adopting this amendment to the Estate Tax Law, the Congress was attempting to remove what it deemed to be an advantage. If it was the Congress' aim to place the community property states on an equality with the common law states, the statute in question is wide the mark. Far from equalizing the tax, Congress has seriously discriminated against the community property states as shown above and has made the burden of estate taxes heavier in those states than in other states.[25] In any event, with deference, we submit that the Committee seems to be unaware of the real nature of the community partnership and substantially similar legal relationships in other

[25]For example, a man in New York accumulates a net estate of $1,000,000 and dies leaving a typical Will whereby his wife receives the income from his estate for her life with remainder to his children. His estate tax is $325,700.00. At his wife's later death, her life estate terminates and no tax is payable when the property passes to the children. Contrast this with the Louisiana citizen who accumulates the same amount and dies leaving the same Will. He must (in most cases) pay the same tax at his death, but since his Will passes only his half interest, his wife at her later death must pay an estate tax on her half which amounts to approximately $140,000.00. These two spouses in Louisiana pay, together $465,000.00 or nearly 50% more than the New York spouses pay. Similarly, if in the same illustration, the wife of the New Yorker died first there would be no tax but her husband would pay $325,700.00 at his later death. If the Louisiana wife died she would pay $325,700 (in most cases) as against zero for the New York wife, and her husband must pay an additional $140,000.00 at his later death. Again they pay nearly 50% more than the New York couple.

states. An advantage for tax purposes presupposes that certain individuals or legal relationships are selected and given more favorable treatment than that accorded substantially identical relationships or individuals similarly situated. It is not discrimination to tax one more than another if one actually owns more than the other. Husbands and wives who have contracted and adopted a community partnership under their local state law are not in the same situation with regard to property rights as husbands and wives generally in other states. The fundamental and practical features of the community partnership law, previously enumerated in our summary, show clearly that the community partnership between husband and wife is in no sense a fiction, but is in substance a partnership imposed by contract and law. Therefore, the test of discrimination is a comparison between how marital partners are taxed in community property partnership states and how they are taxed in other states. When so examined, it clearly appears that the 1942 Amendment did not remove, but actually created, discrimination based only on geographic location.[26]

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[26]The so-called tax privileges which prior to the Amendment of 1942 were enjoyed by the husband and wife who had contracted a marital partnership in community partnership states are now given and will continue to be given to all of the substantially analogous legal relationships in other States, because the 1942 Amendment is only applicable to the community partnership states. For example, husbands and wives in many common law states may by contract voluntarily form a partnership substantially similar to the community partnership. In most states, the husband, by donating half of his property to his wife, and obtaining an appointment from the wife as managing agent of her property, brings about a legal relationship with regard to marital property similar to the community partnership. *Tracy v. Commissioner* (C. C. A. 6th Cir.) 70 F. (2nd) 93; *Verden v. Commissioner*, 6 B. T. A. 1123; *Wright v. Commissioner*, 26 B. T. A. 21; Commerce Clearing House Income Tax Service, see rulings set out in Section 1169; See also *Dunham v. Commissioner*, 27 B. T. A. 1068; *Gillette v. Commissioner*, 18 B. T. A. 434; In re: Bellingrath, 3 B. T. A. 11; *First National Bank v. Commissioner*, 13 B. T. A. 1096. A spendthrift trustee and the beneficiary or beneficiaries of such a trust is a common law legal relationship substantially similar to the community partnership relationship. The ordinary limited partnership with a managing partner is another example. In *Poe v. Seaborn*, *supra*, this Court recognized that "the powers of partners or of trustees of a spendthrift trust, furnish apt analogies".

In last analysis, every complaint of discrimination and special privilege addressed to the recognition of community partnership property for tax purposes originates from the conception, wholly erroneous, that the systems of marital property rights prevailing in non-community property States are superior to community partnership systems; are more intrinsically just, are more in line with general conceptions of ownership—if any such there be. These critics take the view that the smaller number of States should conform their systems of marital property rights to the systems prevailing in the larger number of States. This does not have the merit of a national system. It involves no concessions from the States in the majority, simply a surrender of rights by the minority.[27]

Since the adoption of the Federal Constitution there has been a constant change in the marital property systems in force in most of the States. Perhaps all of the original thirteen states at an early date had the old common law concept of marital property rights, the merging of the wife's identity with that of the husband and his acquisition upon marriage of all of the property which she then owned and all of the fruits of any activity in which she might thereafter engage. The necessary result of this system was to build up the estate of the husband. Everything was his, including his wife. Every departure from this ancient concept was in the direction of increasing the wife's property rights:—her right to continue to own the property which belonged to her at marriage; her right to profit individually by her own efforts and activities; and her right to manage her property and the

[27]This view has the further vice of looking only at so-called benefits and disregarding burdens. See the rights of the wife in community property summarized at pp. 13-15, *supra*. As to comparative justness, we merely repeat the community property view—even though entirely non-commercial, the wife's activities merit as much economic reward as do the husband's commercial activities. She is entitled to her rights—not gratuities.

fruits of her effort. Every such statutory change dismin-ished the property of which the husband might die pos-sessed; consequently, it diminished the tax which could be levied upon his estate. These statutory changes came at dif-ferent times in different states. In common law or code states there has been, and there no doubt is today, sub-stantial variations in marital property systems. So, if A and wife lived in South Carolina or Maryland, there may be a substantial difference in their rights to property acquired during the existence of the marriage from what those rights would have been had they acquired the same property from the same sources while residing in Wis-consin or Missouri. Is it discrimination or an unfair privilege, or estate tax advantage, to recognize those dif-ferent marital property systems in determining the inci-dence of the tax? No one will so contend. Yet, discrimi-nation is there in just the same sense that it exists be-tween the community property and other states. If, for example, New York should decide to revert to the ancient common law doctrine, would it be discriminated against because the Federal Government, having nothing to do with its decision so to revert to that system, recognized it in determining the incidence of the Federal Estate Tax upon its citizens?[28] The same answer must be given to every assertion that citizens of community partnership states enjoy special privileges or tax advantages. Like-wise, every failure to measure the tax by ownership re-sults, not in removing an assumed advantage, but in gross discrimination and an unconstitutional lack of uni-formity.

The short answer to all of the claims of special privi-lege is that neither Congress nor any other branch of

[28]Differing rules as to the ownership of earnings of minor children furnish another example of such discrimination. Cf. the California law depriving parents of all, or part, of their children's earnings. (California Civil Code Sec. 361, 362.)

the Federal Government is concerned with or has any power over the marital property systems in force in the various states, and, where these systems have a bearing upon the incidence of a federal tax, the extreme limit to which any branch of the Federal Government can go is to examine them as they are construed and applied by state courts to determine whether they are real and whether, tested by basic concepts of ownership, the one declared by state law to be the owner of property is actually such. Having so determined, the incidence of the tax is controlled thereby and that this incidence may be varied in the different states is no tax advantage.

It is apparent, since the law of each state must determine questions of ownership, that it is not possible to obtain identical practical results from the operation of the Federal Revenue Laws in each of the forty-eight states of the Union, unless Congress wishes to do violence to the dual character of our Government and the historic and settled principle that the Federal Government will recognize marital rights and the ownership of property as defined and created by local state laws in the various states.[29]

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[29]Congress has, of course, no power to legislate on domestic relations, proprietary interests in property or the origin of ownership, as these questions are exclusively within the powers of the States. *Ohio v. Agler*, 280 U. S. 379, 74 L. Ed. 489; *Smith v. Alabama*, 124 U. S. 465. To the extent that this statute undertakes to create property interests not recognized by state law, it violates these fundamental principles and strikes at the very root of our dual system of government. *McCullough v. Maryland*, 4 *Wheat.* 316-437, 4 L. Ed. 579, Slaughter House Cases, 16 Wall 36-130, 21 L. Ed. 394.

It is, on the other hand, the peculiar and special province of the states to enact legislation which will make for stability of the family and encourage family life. In the exercise of this province, certain of the states, long before the adoption of any federal income or estate tax laws, have seen fit through community partnership property laws to invest husbands and wives with a community or partnership of interest in the business and financial transactions of each other, as well as in their social and personal relationships. This constitutes a valuable advance in the recognition of women's rights and in social progress. It gives, particularly to the wife, a position of security and a just, direct and vested ownership in the financial gains resulting from the endeavors of her husband and herself. It invests the wife with the status of

The Treasury Department, which sponsored the Estate Tax Amendment, seems to feel that uniformity is desirable. It is obvious that mathematical uniformity cannot be obtained by having Congress, in the form of a discriminatory legislative act, **disregard the fundamental laws of some states of the Union, and at the same time, recognize the local law of all of the other states of the Union as a guide and basis for the application of the Federal Estate Tax Law.** If the Government desires to tax the separately owned property and estates of both husband and wife as a whole and as a unit, it is not constitutional or fair to attempt to bring about this result by legislative *fiat* in only a few selected states of the Union. If identical mathematical uniformity is sought

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[20]—(continued)

equality and emancipates her from the limitations and status of inferiority to which she was subjected under the ancient common law principles. It enables the wife to maintain her self respect as a human being with equality with her husband and thus eliminates the irritation which otherwise may arise between those essentially equal but occupying positions of dominance and subservience.

The community partnership property system ministers to the success of family life. It is only natural that a wife who has vested community ownership in the earnings of her husband will take a greater interest and cooperate with more enthusiasm in the activities in which her husband may be engaged than will a wife who is by law made inferior and dependent upon her husband's generosity. These are the concepts which underlie the community property system.

The policies of the various states which have adopted the community property system, involving the recognition of these progressive concepts and the attempt to establish a better plan of marital relations in their respective states, are justly deserving of encouragement and support. At least such states should not be thwarted or embarrassed in the adoption and administration of such policies by any legislation of the Federal Government, which will render less effective the community property partnership system, or deny to the members of the marital partnership the full benefits and enjoyment of the rights thus established.

It is of the utmost importance that federal legislation shall not entrench upon this critically important field of state action or impede the states in the pursuit of this evolution in social progress. The fundamental importance of the family as the basic unit of the social structure of our nation has long been recognized and clearly established. It certainly is not and should not be within the constitutional authority of the Federal Government to adopt or enforce legislation which will annul or invalidate in any manner whatsoever the legal effects of statutes of the states serving the purpose of social advancement in connection with a question of such vital domestic importance.

to be accomplished, the Treasury Department should try to persuade Congress to attempt to tax the separate property and estates of husbands and wives as a unit in all the states of the Union. Insofar as husbands and wives are concerned, such a law would be uniform in its application in every state of the Union. This procedure, however, would only remove one of the objections to the present vicious estate tax amendment, namely, that it arbitrarily and unfairly disregards the property rights of the community partnership property states and discriminates against these States in calculating the Federal Estate Tax. If such a suggestion were adopted, and the Federal Estate Tax Law attempted to impose a Federal Estate Tax based on all of the property of both husband and wife in every state in the Union, regardless of which spouse died first, such a law would still be arbitrary and unfair as a gross discrimination against married people in favor of single people and would, of course, be an arbitrary attempt to measure the tax of one person by the property of another. Until and unless the Federal Government is given and exercises power to regulate marital property and other local matters, any Federal Tax Act which does not recognize actual ownership, as fixed by state law, will be invalid.

AMICI CURIAE

The attorneys submitting and signing this *Amici Curiae* brief represent the following State Bar Associations and State Community Property Taxpayers' Committees all of which are interested in the outcome of this case:

Charles E. Dunbar, Jr. of New Orleans, representing the Louisiana State Bar Association and the Louisiana Community Property Taxpayers' Committee; R. N. Gresham of San Antonio, J. P. Jackson of Dallas, Palmer

Hutcheson of Houston and Harry C. Weeks of Fort Worth, representing the State Bar of Texas; George Donworth of Seattle, representing Washington State Bar Association and a committee of Community property taxpayers of the State of Washington; Joseph D. Brady of Los Angeles, Russell F. O'Hara of Vallejo, and Jerold E. Weil of San Francisco, representing State Bar of California; Blaine B. Shimmel of Phoenix, Samuel H. Morris of Globe, and Gerald Jones of Tucson, representing State Bar of Arizona; and Paul Hyatt of Lewiston, representing Idaho State Bar Commission.

IN CONCLUSION

It is respectfully submitted that the judgment of the Supreme Court of Louisiana is correct and should be affirmed.

Respectfully submitted,

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January 1, 1944.

APPENDIX

I.

FEDERAL STATUTES

Revenue Act of 1942

"Sec. 401. **Estates to which Amendments Applicable.** Except as otherwise expressly provided, the amendments made by this Part shall be applicable only with respect to estates of decedents dying after the date of the enactment of this Act."

"Sec. 402. **Community Interests.**

"(a) **Transfers of Community Property in Contemplation of Death, etc.**—Section 811 (d) (relating to revocable transfers) is amended by adding at the end thereof the following new paragraph:

'(5) Transfers of community property in contemplation of death, etc.—For the purposes of this subsection and subsection (c), a transfer of property held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, shall be considered to have been made by the decedent, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse.'

"(b) General Rule—Section 811 (e) (relating to joint interests) is amended as follows:

(1) By striking out '(e) Joint Interests.—' and inserting in lieu thereof

'(e) Joint and Community Interests.—

'(1) Joint interests.—'.

(2) By inserting at the end thereof the following new paragraph:

'(2) Community interests.—To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possesion of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition.' "

* * * * * *

"Sec. 404. **Proceeds of Life Insurance.**

"(a) General Rule.—Section 811 (g) (relating to life insurance) is amended to read as follows:

'(g) Proceeds of Life Insurance.—

'(1) **Receivable by the executor.**—To the extent of the amount receivable by the executor as insurance under policies **upon the life of the decedent.**

'(2) **Receivable by other beneficiaries.**—To the extent of the amount receivable by all other beneficiaries as insurance under policies upon the life of the decedent (A) purchased with premiums, or other consideration, paid directly or indirectly by the decedent, in proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance, or (B) with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in con-

junction with any other person. For the purposes of clause (A) of this paragraph, if the decedent transferred, by assignment or otherwise, a policy of insurance, the amount paid directly or indirectly by the decedent shall be reduced by an amount which bears the same ratio to the amount paid directly or indirectly by the decedent as the consideration in money or money's worth received by the decedent for the transfer bears to the value of the policy at the time of the transfer. For the purposes of clause (B) of this paragraph, the term 'incident of ownership' does not include a reversionary interest.

'(3) **Transfer not a gift.**—The amount receivable under a policy of insurance transferred, by assignment or otherwise, by the decedent shall not be includible under paragraph (2) (A) if the transfer did not constitute a gift, in whole or in part, under Chapter 4, or, in case the transfer was made at a time when Chapter 4 was not in effect, would not have constituted a gift, in whole or in part, under such chapter had it been in effect at such time.

'(4) **Community property.**—For the purposes of this subsection, premiums or other consideration paid with property held as community property by the insured and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, shall be considered to have been paid by the insured, except such part thereof as may have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse; and the term 'incidents of ownership' includes incidents of ownership possessed by the decedent at his death as manager of the community.'

"(b) **Liability of Life Insurance Beneficiaries.**—Section 826 (c) (relating to apportionment of liability of beneficiaries) is amended to read as follows:

'(c) **Liability of Life Insurance Beneficiaries. Unless the decedent directs otherwise in his will,** if any part of the gross estate **upon which tax has been paid** consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds of such policies bear to **the sum** of the net estate **and the amount of the exemption allowed in computing the net estate, determined under section 935 (c).** If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio.'

"(c) **Decedents to Which Amendments Applicable.**—The amendments made by subsection (a) shall be applicable only to estates of decedents dying after the date of the enactment of this Act; but in determining the proportion of the premiums or other consideration paid directly or indirectly by the decedent (but not the total premiums paid) the amount so paid by the decedent on or before January 10, 1941, shall be excluded if at no time after such date the decedent possessed an incident of ownership in the policy."

"Sec. 407 **Deduction on Account of Property Previously Taxed.**

"(a) **Amendments to Internal Revenue Code Provisions Relating to Property Previously Taxed.**—

"(1) The first paragraph of section 812 (c) is amended to read as follows:

'(c) **Property Previously Taxed.**—An amount equal to the value of any property (1)

forming a part of the gross estate situated in the United States of any person who died within five years prior to the death of the decedent, or (2) transferred to the decedent by gift within five years prior to his death, where such property can be identified as having been received by the decedent from the donor by gift, or from such prior decedent by gift, bequest, devise, or inheritance, or which can be identified as having been acquired in exchange for property so received. **Property includible in the gross estate of the prior decedent under section 811 (f) and property included in total gifts of the donor under section 1000 (c) received by the decedent described in this subsection shall, for the purposes of this subsection, be considered a bequest of such prior decedent or gift of such donor.** This deduction shall be allowed only where a gift tax imposed under Chapter 4, or under Title III of the Revenue Act of 1932, 47 Stat. 245, or an estate tax imposed under this **chapter** or any prior Act of Congress, was finally determined and paid by or on behalf of such donor, or the estate of such prior decedent, as the case may be, and only in the amount finally determined as the value of such property in determining the value of the gift, or the gross estate of such prior decedent, and only to the extent that the value of such property is included in the decedent's gross estate, and only if in determining the value of the net estate of the prior decedent no deduction was allowable under this **subsection, section 861 (a) (2), or the corresponding provisions of any prior Act of Congress,** in respect of the property or property given in exchange therefor.' "

"Sec. 411. **Liability of Certain Transferees.**

"(a) **Imposition of Liability.**—Section 827 (b) is amended to read as follows:

"(b) **Liability of Transferee, etc.**—If the tax herein imposed is not paid when due, then the spouse, transferee, trustee, surviving tenant, person in possession of the property by reason of the exercise, nonexercise, or release of a power of appointment, or beneficiary, who receives, or has on the date of the decedent's death, property included in the gross estate under section 811 (b), (c), (d), (e), (f), or (g), to the extent of the value, at the time of the decedent's death, of such property, shall be personally liable for such tax. Any part of such property sold by such spouse, transferee, trustee, surviving tenant, person in possession of property by reason of the exercise, nonexercise, or release of a power of appointment, or beneficiary, to a *bona fide* purchaser for an adequate and full consideration in money or money's worth shall be divested of the lien provided in section 827 (a) and a like lien shall then attach to all the property of such spouse, transferee, trustee, surviving tenant, person in possession, or beneficiary, except any part sold to a *bona fide* purchaser for an adequate and full consideration in money or money's worth.'

"(b) **Definition of Transferee.**—Section 900 (e) is amended to read as follows:

"'(e) **Definition of 'Transferee'.**—As used in this section, the term 'transferee' includes heir, legatee, devisee, and distributee, **and includes a person who, under section 827 (b), is personally liable for any part of the tax.**' "

"Sec. 451. **Gifts to Which Amendments Applicable.** Except as otherwise expressly provided, the amendments made by this Part shall be applicable only with respect to gifts made in the calendar year 1943, and succeeding calendar years."

"Sec. 453. **Gifts of Community Property.** Section 1000 (relating to tax on gifts) is amended by

inserting at the end thereof the following new subsection:

'(d) **Community Property.**—All gifts of property held as community property under the law of any State, Territory, or possession of the United States, or any foreign country shall be considered to be the gifts of the husband except that gifts of such property as may be shown to have been received as compensation for personal services actually rendered by the wife or derived originally from such compensation or from separate property of the wife shall be considered to be gifts of the wife.' "

Internal Revenue Code:

"Sec. 810. **Rate of Tax.** A tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 812) shall be imposed upon the transfer of the net estate of every decedent, citizen or resident of the United States, dying after the date of the enactment of this title."

"Sec. 811. **Gross Estate.** The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States"—

"Sec. 811 (a) **Decedent's Interest.**—To the extent of the interest therein of the decedent at the time of his death;"

"Sec. 811(e)

"(e) **Joint Interests.**—To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor,

except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: **Provided,** That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: **Provided further,** That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants."

"Sec. 812 **Net Estate.** For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—"

"Sec. 812 (b)

"(b) **Expenses, Losses, Indebtedness, and Taxes.**—Such amounts—

"(1) for funeral expenses,

"(2) for administration expenses,

"(3) for claims against the estate,

"(4) for unpaid mortgages upon, or any indebtedness in respect to, property where the value of decedent's interest therein, undiminished by such

mortgage or indebtedness, is included in the value of the gross estate, and

"(5) reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent,

as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered, * * * * * * * For the purposes of this section the term 'property subject to claims' means property includible in the gross estate of the decedent which, or the avails of which, would, under the applicable law, bear the burden of the payment of such deductions in the final adjustment and settlement of the estate; and, for the purposes of this definition, the value of the property shall be reduced by the amount of the deduction under the next sentence attributable to such property. * * * * * * *"

"Sec. 812 (c)

"(c) **Property Previously Taxed.** An amount equal to the value of any property (1) forming a part of the gross estate situated in the United States of any person who died within five years prior to the death of the decedent, or (2) transferred to the decedent by gift within five years prior to his death, where such property can be identified as having been received by the decedent from the donor by gift, or from such prior decedent by gift, bequest, devise, or inheritance, or which can be identified as having been acquired in exchange for property so received."

"Sec. 826 (b)

"(b) **Reimbursement Out of Estate.** If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still

undistributed or by a just and equitable contribution by the persons whose interests in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this subchapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution."

"Sec. 826 (c)

"(c) **Liability of Life Insurance Beneficiaries.** Unless the decedent directs otherwise in his will, if any part of the gross estate upon which tax has been paid consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds of such policies bear to the sum of the net estate and the amount of the exemption allowed in computing the net estate, determined under section 935 (c). If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio."

"Sec. 113. **Adjusted Basis for Determining Gain or Loss.**

"(a) **Basis (Unadjusted) of Property.** The basis of property shall be the cost of such property; except that—

"(5) **Property Transmitted at Death.** If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition."

LOUISIANA STATUTES

Act 119 of the Legislature of Louisiana of 1932.

Estate Transfer Tax.

AN ACT

To obtain the benefit of credit allowed under the Federal Estate Tax Law by levying an Estate Transfer Tax in addition to the Inheritance Tax provided in Act 127 of 1921 as amended by Act 44 of 1922; and to provide for its collection.

All Estate.

Section 1. Be it enacted by the Legislature of the State of Louisiana, That there is hereby levied, in addition to the inheritance tax as now provided by Act 127 of 1921, as amended by Act 44 of 1922, an estate transfer tax upon all estates which are subject to taxation under the Federal Revenue Act of 1926.

Amount of Tax.

Section 2. Whenever the aggregate amount of all inheritance, succession, legacy and estate taxes actually paid to the several states of the United States in respect to any property owned by such decedent shall be less than eighty per cent (80%) of the estate tax payable to the United States under the provisions of the said Federal Revenue Act of 1926, but not otherwise, the difference between said amount and said eighty per cent (80%) shall be paid to the State of Louisiana.

Procedure.

Section 3. The provisions of Act 127 of 1921 as amended by Act 44 of 1922, insofar as applicable shall regulate the proceedings to fix the amount of the tax hereby levied and the manner in which same shall be collected.

Intent and Purpose.

Section 4. It is hereby declared to be the intent and purpose of this Act to obtain for this state the benefit of the credit allowed under the provisions of title III, section three hundred and one, sub-section (b), of the Federal Revenue Act of nineteen hundred twenty-six to the extent that this State may be entitled by the provisions of said Act, by imposing additional taxes, and the same shall be liberally construed to effect this purpose.

Provisions Applicable.

Section 5. The provisions of this Act shall apply to all estates not fully distributed and now in process of settlement, where the date of death was subsequent to February twenty-six nineteen hundred twenty-six; provided there is at the time this act goes into effect a sufficient amount still due the United States Government under said Federal Revenue Act of 1928 from which to make the deduction contemplated by Section 3 hereof.

Constitutionality.

Section 6. If any section or portion of this Act be finally held to be unconstitutional by a court of competent jurisdiction such decision shall not invalidate the portions unaffected thereby.

Approved by the Governor,
July 7, 1932.

A true copy:

E. A. CONWAY,
Secretary of State.

Louisiana Revised Civil Code, 1870:

Art. 2405. Community presumed on dissolution of marriage.—At the time of the dissolution of the marriage, all effects which both husband and wife reciprocally possess, are presumed common effects or gains, unless it be satisfactorily proved which of such effects they brought in marriage, or which have been given them separately, or which they have respectively inherited.

Art. 2402. Property forming community—Personal injuries to wife.—This partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estate which they may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two and not of both, because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase. But damages resulting from personal injuries to the wife shall not form part of this community, but shall always be and remain the separate property of the wife and recoverable by herself alone; "provided where the injuries sustained by the wife result in her death, the right to recover damages shall be as now provided for by existing laws." (As amended, Act 1902, No. 68.)

Art. 2599. Retention of possession by vendee until price and expenses restored.—He may remain in possession of the thing sold until the seller has restored the price which he paid, together with his expenses.

Art. 2406. Dissolution of marriage—Division of community.—The effects which compose the partnership

or community of gains, are divided into two equal portions between the husband and the wife, or between their heirs, at the dissolution of the marriage; and it is the same with respect to the profits arising from the effects which both husband and wife brought reciprocally in marriage, and which have been administered by the husband, or by husband and wife conjointly, although what has been thus brought in marriage, by either the husband or the wife, be more considerable than what has been brought by the other, or even although one of the two did not bring anything at all.

Art. 2404. Husband master of community—Gratuituous and fraudulent conveyances.—The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.

He can make no conveyance *inter vivos*, by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the children of the marriage. A gratuitous title within the contemplation of this article embraces all titles wherein there is no direct, material advantage to the donor.

Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons.

But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one-half of the property, on her satisfactory proving the fraud. (As amended, Act 1926, No. 96).

Art. 2385. Wife failing to administer paraphernal property—Management by husband.—The paraphernal property, which is not administered by the wife separately and alone, is considered to be under the management of the husband.

Art. 2386. Fruits of paraphernal property—Ownership.—When the paraphernal property is administered by the husband, or by him and the wife indifferently, the fruits of this property, whether natural, civil, or the result of labor, belong to the conjugal partnership, if there exists a community of gains. If there do not, each party enjoys, as he chooses, that which comes to his hands; but the fruits and revenues, which are existing at the dissolution of the marriage, belong to the owner of the things which produce them. (As amended, Acts 1871. No. 87.)

Art. 2399. Community of acquets and gains—Stipulation against required.—Every marriage contracted in this State, superinduces of right partnership or community of acquets or gains, if there be no stipulation to the contrary.

Art. 2329. Alteration of agreement after marriage prohibited—Couples removing into state—Contracts.—Every matrimonial agreement can be altered by the husband and wife jointly before the celebration of marriage; but it can not be altered after the celebration. Provided that in the case of married couples removing to this State and settling therein from other States and countries after marriage, they shall have the right at any time within one year after the passage of this act, or a like period after such settlement in this State, to make a valid marriage contract, subject in all other respects to the laws of this State. (As amended, Act. 1910, No. 236.)

Art. 2325. Antenuptial contracts authorized—Restrictions.—In relation to property, the law only regulates the conjugal association, in default of particular agreements, which the parties are at liberty to stipulate as they please, provided they be not contrary to good morals, and under the modifications hereafter prescribed.

Art. 2392. Stipulation against marital partnership.—Married persons may stipulate that there shall be no partnership between them.

Art. 2807. The community of property, created by marriage is not a partnership; it is the effect of a contract governed by rules prescribed for that purpose in this Code."

FILE COPY

JAN 31 1944

IN THE

Supreme Court of the United States

October Term, 1943

No. 252

J. HOWELL FLOURNOY, Sheriff and Ex-officio Tax Collector,

Appellant,

vs.

SAMUEL G. WIENER, WILLIAM B. WIENER and JACQUES L. WIENER,

Defendant.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA.

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IN THE

Supreme Court of the United States

October Term, 1943

No. 252

J. HOWELL FLOURNOY, Sheriff and Ex-officio Tax Collector,

Appellant,

vs.

SAMUEL G. WIENER, WILLIAM B. WIENER and JACQUES L. WIENER,

Defendant.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA.

Brief of Attorneys General of California, Arizona, Idaho, Nevada, New Mexico, Texas, and Washington, and Oklahoma Tax Commission, as Amici Curiae.

The Attorneys General of the States of California, Arizona, Idaho, Nevada, New Mexico, Texas and Washington, and the Oklahoma Tax Commission, pursuant to leave of the Court, file this brief as *amici curiae* in support of the decision of the Supreme Court of Louisiana, reported in 14 So. (2d) 475. In so doing they are acting in behalf of the people of their respective states, to whose interests and social polity the present cause is of vital concern.

The Question Presented.

Omitting formal matters sufficiently covered in other briefs on file, and assuming the Court's jurisdiction, we approach at once the problem of the validity of the 1942 amendment to Section 811(e) of the Internal Revenue Code (56 Stat. 941), by which there was included within a decedent's taxable estate, property

> "To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition."

Carrying forward the same concept, the 1942 Act added corresponding provisions relative to life insurance purchased with community funds (Sec. 811(g)(4), I. R. C., 56 Stat. 941); and to "gifts of property held as community" (Sec. 1000(d), I. R. C., 56 Stat. 952).

The Congressional Concept of Community Property.

The Report of the House Ways and Means Committee on the 1942 Act says (in part):[1]

> "For the purpose of Federal estate taxation, husband and wife living in community property States enjoy a preferential treatment over those living in non-community property States. This is due to the fact that all of the property acquired by the husband after marriage, through his own efforts, in a community-property State is treated as if one-half belonged to the wife. In non-community-property States, all such property is regarded as belonging entirely to the husband." (C. C. H. Inheritance, Estate and Gift Tax Service, 7th Ed., Par. 3448.50.)

After illustrating the results of this alleged "preferential treatment," the Report continues:

> "Your committee seeks to remedy this situation by providing that such property is includible in the gross estate of the husband unless it can be shown to have been received as compensation for personal services actually rendered by the surviving wife or derived originally from such compensation or other separate property of the surviving wife. * * *"

The Report of the Senate Finance Committee says the amendments "make due provision for the exclusion from the gross estate of that portion of the community property which is *economically attributable* to the survivor." (Emphasis supplied.)

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[1] On legislative history as an aid to construction, see *Harrison v. Northern Trust Co.*, 317 U. S. 476 (1943); *Riggs v. del Drago*, 317 U. S. 95, 98, 99 (1942); *Helvering v. Griffiths*, 318 U. S. 371, 378, *et seq.* (1943).

We note the House Committee's statement that in community property states, property acquired by the husband's efforts after marriage "is treated *as if* one-half belonged to the wife." With serenity and finality, the *as if* assumes that the wife's ownership is a fiction. The Senate Report, more considerate in form, carries the same implication. To whom, says the Senate, is the property "economically attributable"? The state law, through whose grace and under whose protection the property was acquired—which permitted the property to be held in private, rather than public ownership—deems it attributable to *both* spouses. But the Senate Committee, guided by an inner light, attributes the property to one spouse, presumably the husband.

Thus do Committees of Congress set at naught a system of property rights which was old when Congress itself came into existence; which is older than the common law, one of whose cruder concepts, the inferiority of women and their subordinate place in the social order, Congress has assumed as self-evident truth. In fact, Congress has assumed that concept as being endowed with such innate vigor and authority that the contrary concept is not merely inferior in force and effectiveness, but is nonexistent. The wife is treated, says Congress, *as if* she were a part owner. Immediately follows the Congressional concept of the true rule—the same yesterday, today and forever, which no legislature can effectively repeal or modify. Says the Committee, "In non-community-property States, all such property is regarded as belonging entirely to the husband."

Since property cannot belong *entirely* to one person without excluding the claims of all others, it is manifest

that a married woman, in *some* of the states, has no rights in property which Congress is bound to respect. The announcement by this Court that as a matter of historic fact, certain members of the human race had no rights which other men were bound to respect (*Dred Scott v. Sandford*, 19 How. 393, 407) played its part in bringing on a war. While we anticipate no such result in this case even though the decision be adverse to the community property states, we submit, in all deference to Congress and with the greatest respect, that its own comments condemn its handiwork. They show that Congress, deeming the community property laws a fictional device operating in impairment of the revenue, is reaching within the internal economy of the states to interfere with property rights not conforming to the Congressional idea of what is seemly—rights regarded in vast areas of our country, and by millions of people, as realities, not as fictions destructible at the will of Congress because Congress prefers the rule that "all such property is regarded as belonging entirely to the husband."

Congress, fleeing from what it regards as a fiction—that the wife can possibly be regarded as part owner of property acquired through cooperative endeavor in which she shares burdens and sacrifices—*embraces the most outmoded fiction of the common law*, namely, that husband and wife are one, and that one the husband.[2] It seems to us that in the best of all possible worlds, *equal* ownership of the spouses would be more likely to be regarded as consonant with natural justice than the concept, be-

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[2]The phrase is that of Holmes, J., dissenting in *Hooper v. Tax Commission*, 284 U. S. 206, 219.

loved of the common law and of Congress, that property acquired through the joint efforts of two persons must of necessity all belong to one. The apparent belief on the part of Congress that the wife's interest in community property is a delusion, hardly more than a pretense—that she is not the owner but is only treated *as if* she were—is, we submit, the result of a misconception of the nature of community property, its history, and the social policy which it exemplifies.

Origin of Community Property in America.

We have said that the community property system was old at the birth of the American Congress, which a century and a half later was to deny that the system had any substantial reality. That system had had at least a millenium of existence when stout Cortez (actually it was stout Balboa) stared at the Pacific, silent, upon a peak in Darien. In its origins, now lost in antiquity, it goes back to the beginning of law itself.

In its earlier forms, the family, not merely the spouses was the important property unit. (Jacobs, *Marital Property*, Encyclopaedia of the Social Sciences, Vol. 10, p. 117.) Traces of this system are found in the laws of ancient Egypt (Howe, *The Community of Acquests and Gains*, 12 Yale Law Journal 216 (1902)), of ancient Greece (Roby, *Twelve Tables of Gortyn*, 2 Law Quar. Rev. 135 (1886)), and of ancient Rome (Leage, *Roman Private Law*, 2d Ed., p. 103 *et seq.*; p. 198).

The Teutonic tribes recognized a form of marital community ownership at an early date (Huebner, History of Germanic Private Law, pp. 623, 627). De Funiak in his

recent work, Principles of Community Property, Vol. I, Sec. 11, p. 27, says:

> "The most logical explanation, that most largely borne out by the facts, is that the causes which make the wife the partner of the husband are economic in nature. It is among those races or among those classes of society in which the wife works shoulder to shoulder with the husband to maintain and preserve the common home and possessions, in which she contributes labor rather than the mere 'adornment' of her presence, that she is found to be the partner of her husband with an ownership in the acquests and gains of their common labor and struggles. Thus, it may be noticed that among some migratory and nomadic peoples, which lead a hard and dangerous existence, the wife shared with her husband its dangers and vicissitudes, she was fully cognizant of the details of and shared in his daily life and labor, she lingered on the edge of the battlefields to succor him from or to help him to despoil his enemies, she was side by side with him on dangerous migrations, and took equal part in his councils; among such races the wife was fully recognized as an equal partner. Such a race was that of the Visigoths and indeed most of the Germanic tribes, including the Angles and Saxons, among all of whom the community system was to be found in varying forms. These Germanic tribes did not have a complex form of society, with gradation of classes and its accompanying privileged or landed aristocracy. Their society was essentially democratic in nature."

These tribes, settling other parts of Europe, extended the community system. (Huebner, *supra*, p. 643.) Its origins in France are uncertain. (Brissaud, History of

French Private Law, p. 818.) Originally not accepted in Normandy (Brissaud, *supra*, p. 790), it eventually became the law of all France by the Code Napoleon.

The Visigoths introduced the community system into Spain where originally the husband and wife shared in the community to the extent of the contribution of each (*Fuero Juzgo*, Book 4, Title 2, Law 17), but later shared equally (*Fuero Real*, Book 3, Title 3, Law 1). This is the law today. (*Novisima Recopilacion*, Book 10, Title 4, Law 1).[3]

Among Britons, the idea of family ownership seems to have made little headway (Pollock & Maitland, *History of English Law*, 2d Ed., Vol. 2, p. 251). The authority just cited says (pp. 402, 403):

> "Our own law at an early time took a decisive step. It rejected the idea of community. So did its sister the law of Normandy, differing in this respect from almost every custom of the northern half of France. * * * In the first place, we have to remember that about the year 1200 our property law was cut in twain. The whole province of succession to movables was made over to the tribunals of the church. In the second place, we are told that in France the system of community first became definite in the lower strata of society. * * * We have often had occasion to remark that here in England the law for the great becomes the law for all. * * * In England, with its centralized justice, the habits of the great folk are more important than the habits of

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[3]The Spanish community property laws referred to in this brief will be found in the Appendices, Vol. 2, de Funiak, Principles of Community Property.

> the small. This has been so even in recent days. Modern statutes have now given to every married woman a power of dealing freely with her property and this was first evolved among the rich by means of marriage settlements."

In rejecting the community idea,[4] England plunged herself into archaic depths from which her married women extricated themselves only after centuries of endeavor, and even then found themselves in a less advantageous position than that accorded to them under the community system.

Naturally the conflict between the common law and the community system was transplanted to the North American continent, settled by French, Spanish and English. For generations prior to the English conquest of Canada in 1763, the people of that country had been living under French laws and customs (Howe, *Roman and Civil Law in America*, 16 Harv. Law Rev. 342, 345 (1903)). And those laws, as to marital property at least, still prevail in Quebec (*Beaudoin v. Trudel* [1937], I. Dom. L. R. 216).

By a charter granted in 1712 by the King of France (*Kaskaskia v. McClure*, 167 Ill. 23, 47 N. E. 72), the royal edicts and the *Coutume de Paris* (including, pre-

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[4]In place of a community interest, the common law gave the wife dower, always a flimsy, and with the decline of the economic importance of real property (see *Helvering v. Hallock*, 309 U. S. 106, 118), almost a fraudulent, device. Commenting on the efforts at improvement in this field made in various jurisdictions, Vernier, American Family Laws, Vol. III, p. 346, says: "The most pronounced reaction of the writer after having examined the statutes in this field is a feeling of disgust for the slipshod methods of lawmakers. * * * The statutes are filled with ancient matter which, coupled with piecemeal innovations, forms an inconsistent, ambiguous hodgepodge. In no field is there more evidence of haphazard, fragmentary legislation; and, in most jurisdictions, no field is more deserving of a complete renovation."

sumably, the community property system) became law in the Mississippi Valley and the central Gulf regions originally settled by France (de Funiak, Sec. 40). In 1769, by proclamation of Don Alexander O'Reilly, the French community system was supplanted by the Spanish. For a time prevalent in the east Gulf region, where Spanish law remained for a time in effect (*American Insurance Co. v. 356 Bales of Cotton*, 1 Pet. 511, 544; de Funiak, Sec. 44), the community system finally yielded to the common law in the east and central Gulf areas (see *Riddick v. Walsh*, 15 Mo. 519; de Funiak, Secs. 42, 44), save in Louisiana, where it appears to have been consistently adhered to.

The southwestern region was part of Spain's new world possessions, and by royal order in 1807, the *Novisima Recopilacion* of Spain was made applicable to these territories, thus establishing the community system. (Schmidt, *Civil Law of Spain and Mexico*, p. 99.) Gaining its independence from Spain in 1824, Mexico continued to recognize the community system and later incorporated it into its law. (Novisimo Sala Mexicano, Sec. 2a, Title 4, No. 1, quoted in de Funiak, Sec. 15, n; see Schmidt, *supra*, *Civil Law of Spain and Mexico*, Book 1, Title 1, Chapter IV, Sec. 1.) On obtaining its independence from Mexico in 1836, Texas retained its then existing system of marital property rights (de Funiak, Sec. 45). Of five states, California, New Mexico, Arizona, Nevada and Utah, carved out of territory acquired by the United States from Mexico, the two first named continued the community system without interruption; and Arizona and Nevada adopted it shortly after they had experimented briefly with common law doctrines (Kirkwood, *Historical Background and Objectives of the Law of Community Property in the Pacific Coast States*, 11 Wash. Law

Rev. 1 (1936)). Early Mormon religious practice, more in accord with common law concepts of a wife's status and marital rights, led to the rejection of the community system in Utah (de Funiak, *supra*, Sec. 49, p. 104).

Of the Oregon Territory, the States of Washington and Idaho, after a period of experimentation with the common law, abandoned it in favor of the community system (Kirkwood, *supra*, pp. 6-8). Oklahoma, in 1939, and Oregon, in 1943, in an optional form and independently of pre-existing customs or traditions, adopted community property laws. (See Okla. Stat. Ann., Perm ed., Title 32, Sec. 51 *et seq.*; Ore. Laws 1943, Ch. 440.)

Tribal customs, crystallizing into written laws, and these transmitted to certain communities of the New World, which have in turn influenced their neighbors—these are the origins of community property in the United States. Varying in details which it would serve no present purpose to explore, the community property laws are alike in the respect that they confer upon the spouses property rights of equal dignity, constituting the husband the agent of the community for certain purposes. By reason of these similarities, it is possible to discuss the issues of the present case in a broad way, ignoring minor divergences.

Constitutional Questions Involved.

Why did Congress attach the *as if* stigma to the wife's interest in community property, ascribing to it a fictional character? The answer seems plain. To admit that the wife *is* an owner would cause Congress, by its own admission, to transgress three Constitutional limitations on its powers: (1) It would become a trespasser upon a field reserved to the states; (2) it would violate the Fifth Amendment; (3) it would violate the requirement of geographical uniformity.

I.

The 1942 Act Constitutes an Invasion of the Powers Reserved to the States.

In saying that Congress has no such power, we wish to go somewhat further than saying that the proposed act violates the Fifth Amendment—a point dealt with later. It constitutes an interference with state policy and economy. If a state says that the wife's contribution to community earnings is equal to the husband's, can it be said that such a view is so palpably erroneous that Congress may override it at will?

A present day writer states the social theory underlying the community property system:

> "* * * actually there is attached to the marriage a marital partnership based on the view that two individuals are equally devoting their lives and energies to furthering the material as well as the spiritual success of the marriage. The wife usually remains the home maker, the husband the bread winner, and because his share thus has to do with the earnings and properties acquired their management remains in his hands." (de Funiak, Principles of Community Property, Sec. 95, p. 265.)

Tersely, the Washington Court expresses the community concept: "He [the husband] is, so to speak only the head of a firm. The personal property is just as much hers as his." (*Marston v. Rue*, 92 Wash. 129, 131, 159 P. 111 (1916).)

See also quotation from Jacobs, p. 30, *infra*, and cases cited under heading, Nature of Wife's Interest in Community Property, p. 27, *infra*.

The community property states have created a system of property rights based upon the belief that accumulations of property, the product of industry, are attributable to the wife equally with the husband; or upon a policy which, regardless of the fact, ascribes to them a corresponding ownership. The belief may be erroneous. The policy may be attributed, flatteringly, to generosity to women, or less flatteringly to duress on their part. Whether the actuating motives are good or bad, Congress still may not interfere with the system merely because it looks strange to residents of other states and to lawyers schooled only in the common law.

The framers of the Constitution did not freeze into it common law property concepts. In fact the "feudal economy" is at the present time slightly in disrepute (*Helvering v. Hallock*, 309 U. S. 106, 118, 84 L. Ed. 604 (1940)). Property rights are a part of the vast sphere reserved to the states respectively or to the people under the Tenth Amendment. To say that property belongs entirely to the husband when the law under which it came into existence says one-half of it belongs to the wife, is to substitute a federal for a state system of property rights. To sustain Congress in derogating from property rights conferred by state law, putting them on an *as if* basis, destroying the substance and leaving only the shadow, is to substitute a federal for a state system of property rights.

This addition to the husband's rights, and this derogation from the wife's, go beyond the authority of Congress.

> "When the American people created a national legislature with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the states. These powers proceed not from the people of America but from the people of the several states;

and remain after the adoption of the constitution what they were before, except so far as they may be abridged by that instrument." (Marshall, C. J., in *Sturges v. Crowninshield*, 4 Wheat. 122, 193, 4 L. Ed. 529, 548 (1819).)

"That the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted." (Marshall, C. J., in *Dartmouth College v. Woodward*, 4 Wheat. 518, 629, 4 L. Ed. 629, 657 (1819).)

Conceding, as it must be conceded, that the national government has "authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end" (*United States v. Darby*, 312 U. S. 100, 124, 85 L. Ed. 609 (1941)), it is still sound constitutional doctrine that "the government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people." (*United States v. Cruikshank*, 92 U. S. 542, 551, 23 L. Ed. 588, 591 (1876).) It is as true now as it was in John Marshall's day that the government is "one of enumerated powers." (Marshall, C. J., in *McCulloch v. Maryland*, 4 Wheat. 316, 405, 4 L. Ed. 579, 601 (1819).)[5]

Indisputable is the fact that the domain of property rights is reserved exclusively to the states.

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[5] See, also, *United States v. Butler*, 297 U. S. 1, 63, 80 L. Ed. 477, 487 (1936).

"The power of the State to limit the tenure of real property within her limits and the modes of its acquisition and transfer and the rules of its descent and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. * * * The power of the State in this respect follows from her sovereignty within her limits as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal government. The title and modes of disposition of real property within the state, whether *inter vivos* or testamentary, are not matters placed under the control of Federal authority." (Field, J., in *United States v. Fox*, 94 U. S. 315, 320, 24 L. Ed. 192 (1877).)[6]

Without multiplying quotations, the following recognize or apply in one form or another the principle that the state is sovereign as to those matters which the Constitution commits to the Federal government:

Penoyer v. Neff, 95 U. S. 714, 722, 24 L. Ed. 565, 568 (1878);

Yonley v. Lavender, 88 U. S. 276, 22 L. Ed. 536 (1875);

Hopkins Federal Savings & Loan Association v. Cleary, 296 U. S. 315, 80 L. Ed. 251 (1935).

The same rule applies to another question incidentally arising here, namely, the subject of the relationship of husband and wife, which this Court has held "belongs to

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[6]On state law as governing possibility of revesting property or distribution of income, see *Helvering v. Stuart*, 317 U. S. 154, 161 (1942). State law determines upon whom local taxes are imposed. *Magruder v. Supplee*, 316 U. S. 394, 396 (1942).

the laws of the states and not to the laws of the United States." (*Ohio ex rel. Popovici v. Agler*, 280 U. S. 379, 383, 74 L. Ed. 489 (1930).) A recent decision recognizes "property interests" as one of the "commanding problems in the field of domestic relations with which the state must deal." (*Williams v. North Carolina*, 317 U. S. 287, 298 (1942).)

In the 1942 Act, Congress is seeking to withdraw one of the incidents of the marital relationship from state control. If Congress, preferring the common law rule which regards property acquired during marriage "as belonging entirely to the husband," can establish a basis of taxation for property so owned, different from or more favorable than the basis where property so acquired belongs in part to the wife, then a wide gap has been opened in the line, hitherto deemed impregnable, between federal and state authority over property rights. If Congress can say that in one state a transfer of 100% is taxed on that basis, and that in another a transfer of 50% is taxed as though it were 100%, there is manifest discrimination: and if, going still further, Congress can say that a person (the wife) who has *no* interest in the property which Congress is willing to recognize is nevertheless taxed on the basis of owning 50%, there is manifest injustice. Is it probable that the community property states can withstand the pressure to go over to the system where taxation bears some relation to, and does not ignore, ownership? The retrogressive nature of such a move, and of a law which impairs or infringes upon the more enlightened and generous property system, will be referred to later. (See page 30, *infra*.)

Where the federal government attempts to invade a field of action reserved to the states, it is not important

that the attempted invasion is made under the guise of a taxing act. In *Linder v. United States*, 268 U. S. 5, 17, 69 L. Ed. 819, 823 (1925), the Court says:

> "Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not intrusted to the Federal government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly within power reserved to the states, is invalid, and cannot be enforced."[7]

When Congress, under the guise of a taxing act, ignores property rights attaching at the moment of acquisition and recognized in full vigor by state law, its acts are in derogation, almost in contempt, of the authority of the states. The Federal Estate Tax Act is concerned only with *transfers*—those transfers occurring at, made in contemplation of, or rendered fully effectual only by death. To say that the transfer of A's property to B at A's death is taxable, is undoubtedly within the power of Congress. To say, however, that A's title will be expanded or diminished according to the will of Congress, ignoring the state law which alone grants and governs the right to acquire and to own, is to permit Congress to set aside the laws of the several states and to regulate their internal economy to a degree which up to the present time has not been thought possible.

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[7]See also, *United States v. Butler*, 297 U. S. 1 at 69, 80 L. Ed. 477 (1936).

II.

The 1942 Act Contravenes the Fifth Amendment.

Without elaboration, since the point is fully discussed in the brief of other *amici curiae*, we say—and with apologies, for it is a truism—that one person's property cannot be included in another's estate for the purpose of assessing death duties. We shall defend later the premise involved in the above statement. (See *infra*, page 27.)

Referring to a state statute which in effect compelled one person to pay another's tax, the Supreme Court said in *Hartman v. Greenhow*, 102 U. S. 672, 684, 26 L. Ed. 271 (1881):

> "And surely it is not necessary to argue that an act which requires the holder of one contract to pay the taxes levied upon another contract held by a stranger can not be sustained. Such an act is not a legitimate exercise of the taxing power; it undertakes to impose upon one the burden which should fall if at all upon another."

Property which a decedent has owned but has effectually parted with during his lifetime may not be brought back into his estate for tax purposes by subsequently enacted laws. (*Nichols v. Coolidge*, 274 U. S. 531, 71 L. Ed. 1184 (1927; federal estate tax); *Coolidge v. Long*, 282 U. S. 582, 75 L. Ed. 562 (1931; state inheritance tax).) Property similarly parted with may not be brought back into the estate by laws establishing a conclusive presumption as to the motives attending its transfer. (*Schlesinger v. Wisconsin*, 270 U. S. 230, 70 L. Ed. 557 (1926; state statute); *Heiner v. Donnan*, 285 U. S. 312, 76 L. Ed. 772 (1932; Federal Estate Tax Act).)

The tax being on the interest which ceases at death (*Y. M. C. A. v. Davis*, 264 U. S. 47; *Edwards v. Slocum*, 264 U. S. 61; *Chase National Bank v. United States*, 278 U. S. 327), some substantial interest must cease at death to give rise to a taxable event. (See also authorities, page 21, *infra*.)

If, as *Heiner v. Donnan* points out, the value of a decedent's estate cannot be enhanced by the "fictitious inclusion" of property given away within two years prior to his death, with how much stronger reason may it be said that the estate cannot be enhanced by the fictitious inclusion of property which the decedent never owned at all.

The *Donnan* case condemns an attempt to measure a tax on one person's property by imputing to it in part the value of property of another, as "not taxation, but spoliation" (p. 327 of 285 U. S.). Of tax burdens distributed in accordance with another's wealth, the Court (quoting Judge Learned Hand in *Frew v. Bowers*, 12 F. 2d 625, 630), refers to the "grievous injustice" occasioned by that procedure.

Concerning an analogous question, that of the right to measure a husband's income by income belonging in part to his wife, the Supreme Court says in *Hoeper v. Tax Commission*, 284 U. S. 206, 76 L. Ed. 248 (1931), a case coming up from Wisconsin and involving its income tax law:

> "Since, then, in law and in fact, the wife's income is in the fullest degree her separate property and in no sense that of her husband, the question presented is whether the state has power by an income-tax law to measure his tax, not by his own income but, in part, by that of another. To the problem thus stated, what was said in Knowlton v. Moore, 178 U. S. 41, 77, 44 L. Ed. 969, 984, 20 S. Ct. 747, is apposite:

"'It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems.'

"We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the 14th Amendment. That which is not in fact the taxpayer's income cannot be made such by calling it income. (Compare Nichols v Coolidge, 274 U. S. 531, 540, 71 L. Ed. 1184, 1192; 52 A. L. R. 1081, 47 S. Ct. 710.)"

We are aware that Mr. Justice Holmes—Mr. Justice Brandeis and the present Chief Justice joining—dissented in the *Hoeper* case. That dissent, according to it the full weight which attaches to the opinions of that great man, detracts not at all from, indeed it supports, the authority of the majority decision as applied to the instant case. Mr. Justice Holmes was upholding the authority of the state legislature over a matter of state concern, as we are here. Differing from the majority, he thought the legislature could go back to a common law rule if it saw fit.[8] No

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[8] The Holmes philosophy of non-interference with state laws is well stated in his dissent in *Truax v. Corrigan*, 257 U. S. 312, 344.

conflict between state and federal authority over a state's internal concerns was involved. To reason that because Mr. Justice Holmes considered the state an agency competent to deal with its internal economy in that case, he would believe the federal government empowered in this to *overrule* that same agency, dealing with the same subject matter, seems lacking in coherence.

It is believed that the authorities cited above establish that a tax cannot be levied upon the property or estate of one person in respect of the property or estate of another; and that the inclusion of one person's *community* estate with another's for purposes of taxation falls within the condemnation of this just principle. The federal estate tax being levied on the "exercise of the privilege of directing the course of property after a man's death" (*Estate of Rogers v. Helvering*, 88 L. Ed. Adv. Ops. 148, 150), and that privilege being here non-existent, there is no subject matter to which the tax can apply.

III.

The 1942 Act Contravenes the Requirement That Excise Taxes Be Uniform. (Constitution, Article I, Section 8, Clause 1.)

This contention, raised often, but to this date without notable success, is founded upon the conviction that the uniformity clause was inserted for a purpose, and the belief that the instant case presents an unprecedented situation, favorable to its application.

The federal estate tax is an excise upon the privilege of passing property at death (*United States Trust Co. v. Helvering*, 307 U. S. 57; *Porter v. Commissioner*, 288,

U. S. 436). To bring the statute into operation, death must be the "generating source." (*Knowlton v. Moore*, 178 U. S. 41, 56). It must be "the source of valuable assurance passing from the dead to the living" (*Porter v. Commissioner*, 288 U. S. 436, 444). The subject matter of the excise is "the transfer of or shifting in relationships to property at death" (*United States Trust Co. v. Helvering*, 307 U. S. 57, 60).

It is true that this Court has said in *Poe v. Seaborn*, 282 U. S. 101, 117, as in other cases, that "differences of state law, which may bring a person within or without the category designated by Congress as taxable, may not be read into the Revenue Act to spell out a lack of uniformity." In the instant case, differences of state law do not have to be read into the Act. Congress has itself read these differences into the Act by limiting the applicability of certain provisions to those states where the community system prevails.

So directed and limited, affecting only ten states, the 1942 Act does not operate with geographical uniformity in respect of the transfer of property. It is no answer to say that the statute applies in whatever states may now or hereafter come within the named category. Still undisposed of is the fact that the community relationship is singled out for special and discriminatory legislation not made applicable to other property relationships essentially indistinguishable from it, namely, separate ownership by spouses in non-community states, and marital partnerships. (See pages 27 to 29, *infra*.)

The language of this Court in *Knowlton v. Moore*, 178 U. S. 41, 89, 44 L. Ed. 969, 988, is applicable:

> "Giving to the term uniformity as applied to duties, imposts and excises a geographical significance like-

wise causes that provision to look to the forbidding of discrimination as between the states, by the levying of duties, imposts or excises upon a particular subject in one state and a different duty, impost or excise on the same subject in another; and therefore, as far as may be, is a restriction in the same direction and in harmony with the requirement of apportionment of direct taxes."

Discussing the same point, the Court (p. 84) states a contention of counsel respecting this matter which the opinion later upholds, as follows:

"* * * the words, 'uniform throughout the United States' do not relate to the inherent character of the tax as respects its operation on individuals but simply requires that whatever plan or method Congress adopts for laying the tax in question, the same plan and the same method must be made operative throughout the United States; that is to say that wherever a subject is taxed anywhere the same must be taxed everywhere throughout the United States and at the same rate."

The 1942 Act does not make operative "the same plan and the same method * * * throughout the United States." Since, as pointed out above, essentially similar property relationships in non-community states go free, the 1942 act does not tax the same subject "everywhere throughout the United States." Since the method of taxation devised by the Act will result in including in the husband's estate property which he does not own, it will tax the transfer of property which he *does* own at a higher rate than would otherwise be applicable to him, and at a higher rate than would be applicable to the same

property in a non-community property state. The Act therefore does not tax the same subject "at the same rate." It does the very thing which this Court in the first extract above quoted says cannot be done, namely, it levies an excise "upon a particular subject in one state and a different duty, impost or excise on the same subject in another." In terms directed only at certain states—a feature which it is believed will not be found in any other excise statute—it is for that reason *prima facie* at variance with the requirement of geographical uniformity. But aside from this, it is at variance with that requirement for the further reason, not patent upon the face of the statute itself, that in determining whether transfers are subject to or free from taxation, it applies inconsistent and arbitrary and therefore ununiform rules.

Since, as pointed out above, it is the shifting of economic benefits, or the privilege of transfer which is taxed (*United States Trust Co. v. Helvering*, 307 U. S. 57; *Estate of Sanford v. Commissioner*, 308 U. S. 39, 43), it follows that if no benefits[9] (as to the wife's community half) are shifted at the husband's death, there is no subject matter upon which the tax can operate. Death is not the generating source of any new title. It has only

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[9]It is submitted that *substantial* benefits must be transmitted to give rise to the tax. Any other view would be inconsistent with this Court's intensely practical concept of taxation. See p. 47, brief of Bar and Taxpayers' Associations as *amici curiae*.

The necessity of "passing to the survivor substantial rights" is recognized even in *Tyler v. United States*, 281 U. S. 497, 503. We concur in comments on that case in the brief just mentioned, at p. 36 *et seq.*

removed one who stood in the relationship of a statutory agent in respect of the property (*Poe v. Seaborn*, 282 U. S. 101, 75 L. Ed. 239). As well might it be said that a principal is to be taxed at his agent's death, or a *cestui que* trust at the death of the trustee. Nowhere, save in the community property states, is a tax exacted from the beneficial owner upon the death of a person exercising only managerial powers over the owner's property[10]—non-beneficial powers which the legislature gave and can take away at will.

In thirty-eight states only that property is included in the taxable estate which was in some manner the decedent's, or over which he had a power of disposition deemed sufficient to give rise to the taxable event, the shifting of economic benefits, at his death. In ten states, under the 1942 Act, property is included as to which these indispensable conditions do not exist. This results in two inequalities, both violative of the uniformity requirement.

(1) Property not owned by the decedent and whose devolution he could not control is brought within his taxable estate.

(2) As a consequence, the property which is rightly included within his taxable estate is subjected to higher rates because of this wrongful inclusion.

It would be inaccurate to say that this is but another way of stating the argument based upon the Fifth Amendment, namely, that the property not being the decedent's

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[10]On the cessation of such powers as a non-taxable event, see *Estate of Williams*, 40 Nev. 241, 257, 161 P. 741, L. R. A. 1917C 602 (1916).

cannot be taxed at all.[11] The Act in question might run the gamut of the Fifth Amendment, and still fail in the uniformity test, because it singles out for taxation a property system—an incident, non-existent in the absence of the marital relationship—and says that property rights arising out of that system shall be subjected to a discriminatory burden. This denies uniformity, to the disadvantage of those communities of the Federal Union in whose legislative policy the rights discriminated against have originated.

In the interest of brevity, we concur in and adopt the discussion of discriminatory consequences and lack of uniformity appearing in the brief of the Bar and Taxpayers' Associations as *amici curiae*, at page 43 *et seq.*

By way of summary on this point: If a federal tax statute operates in such a manner that in a common law state it taxes in a husband's estate only the property which he owns or can dispose of, and in a community property state, it taxes in his estate not only property falling in those categories, but property which he does not own and cannot dispose of, its operation is not uniform. Failing to meet the tests prescribed in *Knowlton v. Moore* (see p. 22, *supra*), it is invalid.

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[11]In so far as the claims of the community property states are based only on unreasonable classification or inequality in the incidence of the tax, it seems that the Fifth Amendment affords them no remedy. *Helvering v. Lerner Stores Corp.*, 314 U. S. 463, 86 L. Ed. 343 (1941); *Hirabayashi v. United States*, 320 U. S. 81 (1943).

The Nature of the Wife's Interest in Community Property.

We have maintained throughout that the wife has an interest in community property coordinate and equal with that of her husband. We have referred to essentially similar marital property relationships which are accorded treatment more favorable than the 1942 Act accords to community property. These relationships are (1) separate ownership, and (2) ownership as partners.

(1) The Separate Ownership Analogy.

Elaboration of a point to which the Court is by no means a stranger, fully developed in the brief of other *amici curiae*, would contribute to its burdens rather than its enlightenment.

For convenience of reference we note certain authorities in this Court:

Warburton v. White, 176 U. S. 484, 44 L. Ed. 555 (1900; Washington);

Arnett v. Reade, 220 U. S. 311, 55 L. Ed. 477 (1911; N. M.);

Poe v. Seaborn, 282 U. S. 101, 75 L. Ed. 239 (1930; Wash.);

Goodell v. Koch, 282 U. S. 118, 75 L. Ed. 247 (1930; Ariz.);

Hopkins v. Bacon, 282 U. S. 122, 75 L. Ed. 249 (1930; Tex.);

Bender v. Pfaff, 282 U. S. 127, 75 L. Ed. 252 (1930; La.);

United States v. Malcolm, 282 U. S. 792, 75 L. Ed. 714 (1931; Calif.);

Lang v. Commissioner, 304 U. S. 264, 82 L. Ed. 1331, 118 A. L. R. 319 (1938; Wash.).

Other authorities are cited in the subjoined note.[12]

(2) The Partnership Analogy.

The substantial similarity between a marital partnership and the community relationship, often commented

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[12] *United States v. Goodyear*, 99 F. (2d) 523, 38-2 U. S. T. C. Par. 9532 (C. C. A. 9; Calif.);

Schwartz v. Schwartz, 52 Ariz. 105, 79 P. (2d) 501, 116 A. L. R. 633 (1938);

Siberell v. Siberell, 214 Cal. 767, 772, 7 P. (2d) 1003 (1932);

Bank of America N. T. & S. A. v. Mantz, 4 Cal. (2d) 322, 327, 49 P. (2d) 279 (1935);

Kohny v. Dunbar, 21 Ida. 258, 268, 39 L. R. A. (N. S.) 1107 (1912);

Radermacher v. Radermacher, 61 Ida. 261, 100 P. (2d) 955 (1940), citing earlier Idaho cases;

Estate of Williams, 40 Nev. 241, 161 P. 741, L. R. A. 1917C 602 (1916);

Baca v. Village of Belen, 30 N. M. 541, 240 P. 803 (1925);

Jenkins v. Huntsinger, 46 N. M. 168, 125 P. (2d) 327 (1942);

Arnold v. Leonard, 114 Tex. 535, 545, 273 S. W. 799 (1925);

McJunkin v. Republic National Bank, 131 S. W. (2d) 1085 (Tex. Civ. App., 1939);

Occidental Life Insurance Co. v. Powers, 192 Wash. 475, 74 P. (2d) 27, 114 A. L. R. 531 (1937), citing earlier Washington cases.

Re Coffey's Estate, 195 Wash. 379, 81 P. (2d) 283 (1938).

See also *de Funiak*, Sections 105, *et seq.*

on, is discussed in the brief of the Bar and Taxpayers' Associations, as *amici curiae*. (See pp. 45-47, 49.)[13]

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[13]The following additional citations are noted:

Bender v. Pfaff, 282 U. S. 127, 131, 75 L. Ed. 252 (1930);
Goodell v. Koch, 282 U. S. 118, 121, 75 L. Ed. 247 (1930);
Fuller v. Ferguson, 26 Cal. 546, 566 (1864);
Kohny v. Dunbar, 21 Idaho 258, 121 P. 544, 39 L. R. A. (N. S.) 1107 (1912);
Marston v. Rue, 92 Wash. 129, 159 P. 111 (1916);
de Funiak, Section 95.

On recognition of marital partnership for tax purposes, see:

MacPherson, 19 B. T. A. 651 (Mass.);
Kammerdiner, 25 B. T. A. 495 (Cal.);
Phelps, 13 B. T. A. 1298 (Va.);
Sidney Nathan, C. C. H. Dec. 13,192(M) (Tax Court, 1943);
W. W. Moyer, 35 B. T. A. 1155 (Pa.);
G. C. M. 3421, C. B. VII-1, p. 106;
S. M. 2964, C. B. IV-1, p. 171 (Colo.).

The above relate to income taxes. An estate tax case is *L. I. Fletcher Estate*, 44 B. T. A. 429 (1941; acq.).

Under the 1942 Act, voluntary marital partnerships, in non-community states, will occupy a status superior to marital partnerships, either voluntary or arising by operation of law, in community states. Aside from discrimination, the preference given voluntary associations over those enforced *in invitum* seems a curious transvaluation.

Tenancy in common. Some authorities suggest an analogy between community property and tenancy in common:

Warburton v. White, 176 U. S. 484, 496, 497 (1900; community property is common property);
Williams Estate, 40 Nev. 241, 260, 161 P. 741, L. R. A. 1917C 602 (1916).
Re Coffey's Estate, Note 11, *supra* (undivided one-half interest).

Interests held by tenants in common are severable for tax purposes. *Estate of Irwin A. Smith*, 45 B. T. A. 59 (1941; acq.); Reg. 105, Sec. 81.22 (1st par., last sentence).

There are irreconcilable differences between tenancy by the entireties and community ownership. See *de Funiak*, Sec. 134; see also pp. 36, *et seq.*, Bar and Taxpayers Associations' brief.

On the difficulties of describing community property in common law terms, see the opinion of the present Chief Justice while Attorney General, in 34 Ops. Atty. Gen. 395, 402, T. D. 3670 (1924).

Observations on the Significance of the Present Cause.

The present case involves, on its technical side, a conflict between state and federal authority—a conflict always important, but not new. On its human side, it involves the integrity of a system which has proved its social worth.

Not, as some Congressmen and an occasional law review or text writer supposes, an alien product, incomprehensible and of somewhat sinister design, the community system is the most widely accepted marital property system in the world (Lobingier, History of Conjugal Partnership, 63 Amer. Law Rev. 250, 280 (1929)). The ten American states that now embrace the system comprise 37.6% of the territorial area of the continental United States, excluding Alaska. In 1940, their inhabitants numbered 22,514,599, or 17% of the population of the United States (U. S. Dept. of Commerce, Sixteenth Census of the United States, Population, Vol. I, p. 14). Living within that area are some 17.5% (5,302,542) of the married men and 17.4% (5,255,953) of the married women in the United States (U. S. Dept. of Commerce, Sixteenth Census of the United States, *supra*, Vol. IV, Pt. 1, p. 160).

A commentator on the social sciences says:

> "The idea behind the community property system is on the whole a sound one, apart perhaps from the almost exclusive powers of management given to the husband. * * * It recognizes by law the equality between spouses in regard to property acquired during the marriage by the joint efforts of the parties * * * The community idea is in harmony with the present American conception of marriage, whereby

the relation between the spouses is regarded as a partnership, to which both contribute." (Jacobs, Marital Property, Encyclopaedia of the Social Sciences, Vol. 10, pp. 121, 122.)

"The whole trend of modern law and progressive custom is to regard the wife as an individual, personally and economically." (New Republic, July 14, 1941, p. 39.)

"The momentum of modern life flows in the direction of woman's progress. Any law that retards woman's advance would be fraught with grave social and political implications." (B. Fain Tucker, President Women's Bar Assoc. of Illinois; Women Lawyers' Journal, Apr. 1942.)

Without disparagement of this Court's record in any period of history, it may be said of its decisions in recent years that they uphold liberty, and that they are consistent with the ideal of social progress. Consistent with this ideal is the community concept that the freedom and equality into which the Declaration of Independence says men are born, applies both to men and women. Freedom cannot exist where there is economic servitude. Equality cannot exist where property acquired through the joint efforts of spouses "is regarded as belonging entirely to the husband" (House Comm. Rep., *supra*, p. 13); it cannot exist where the tax laws discriminate between the spouses.

By historical accident this cause comes before this Court at a time when women are doing their full share in the fields, in factories and homes, and in the auxiliary services, to keep the world a decent place for civilized men to live in; when not lingering "on the edge of the battlefields," as did the Visigoth women of the Fifth

Century (see *de Funiak*, page 7, *supra*, the women of Russia are *on* the battlefields, in combat with the common enemy. In such an atmosphere, a plea that Congress, invading state authority, can lawfully say that no attempt by a state to confer equal property rights on women is to be regarded as valid by the federal taxing power, seems particularly lacking in grace and timeliness.[14]

Erskine truly said that "no precedents can sanctify injustice"; but here precedents which might embarrass the Court in serving desirable ends are wanting.[15] Free to follow its judgment, the Court by its decision can mark a milestone in the path of social progress; or it can erect a memorial to a cause whose objectives were equality and justice. These objectives, we believe, constitute no source of embarrassment if, as so often occurs, the question becomes one of "drawing the line" (*Harrison v. Schaffner*, 312 U. S. 579, 583; *Irwin v. Gavit*, 268 U. S. 161, 168).

Conclusion.

In conclusion, we revert to the Congressional concept mentioned at the beginning (page 3, *supra*) to the effect that in non-community-property states, property acquired by the husband after marriage "through his own efforts" is regarded as belonging to the husband. Trans-

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[14]What has happened to the community property system of Germany under its present masters is uncertain. That it does not accord with their ideas of the function of women is suggested by *de Funiak*, Sec. 13, n. On the former German system, see *Hoffer v. Helvering*, 87 F. (2d) 328 (C. C. A. 2, 1937); *Eck v. Miller*, 8 F. (2d) 797 (App. D. C., 1925).

[15]There is here no "long period of accomodations to an older decision," requiring the Court "to adhere to an unsatisfactory rule to avoid unfortunate practical results from a change." *Helvering v. Griffiths*, 318 U. S. 371, 403 (1943).

later, this means that the husband is the beneficiary of his wife's "efforts" as well as of his own. Manifestly, such a system has its advantages to the male population. Since the converts to the community property system have been few, it seems that those advantages are deemed to outweigh certain differences between community and non-community states in respect of taxation. All the states can obtain the advantages, if any, of the community property system by adopting it. The remedy is in their own hands, and the price is willingness to forego the advantages which the common law gives the sex which, with hardy self-deception, believes itself dominant. In the absence of willingness to pay that price, it comes with ill grace for the non-community states, through their lawmaking power as constituting the majority, to enact legislation impairing the operation of the more equitable system.

If Congress can validly enact such legislation, a long step has been taken toward the obliteration of the autonomy of the states, and toward Congressional control over their institutions, customs, laws. In passing a measure having such an effect and tendency, we submit that Congress has misconceived and exceeded its authority.

Respectfully submitted.

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No. 252

In the Supreme Court of the United States

OCTOBER TERM, 1943

J. HOWELL FLOURNOY, SHERIFF AND EX-OFFICIO TAX COLLECTOR, APPELLANT

v.

SAMUEL G. WIENER, WILLIAM B. WIENER, AND JACQUES L. WIENER

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 252

J. HOWELL FLOURNOY, SHERIFF AND EX-OFFICIO TAX COLLECTOR, APPELLANT

v.

SAMUEL G. WIENER, WILLIAM B. WIENER, AND JACQUES L. WIENER

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

The United States presents this brief as *amicus curiae* because it is vitally interested in the question which the parties seek to raise, namely, whether Section 402 (b) of the Revenue Act of 1942, amending Section 811 (e) of the Internal Revenue Code, is constitutional, and believes the question should be litigated only in a controversy directly involving federal estate taxes. We think that the question should not have been passed upon in this proceeding involving a Louisiana tax, that this Court has no jurisdiction, under Section

237 (a) of the Judicial Code, to consider the issue upon appeal, and that the record does not present a federal question which could support a writ of certiorari under Section 237 (b), with respect to the issue raised by the appeal which has been allowed.

ARGUMENT

I

The Court Should Not Accept Jurisdiction of This Case or Pass Upon the Constitutionality of Section 402 (b) of the Revenue Act of 1942 in this Proceeding

A. Introductory

Sam Wiener, Jr. died in Shreveport, Louisiana on December 10, 1942. At the time of death, he and his wife held interests in community property which apparently had been acquired through the husband's earnings during the marriage.[1] Upon

[1] The evidence as to the origin of the community property is not entirely satisfactory, the record showing merely that all of the assets standing in the name of the decedent consisted of community property acquired during the marriage and that all of the decedent's estate consisted of such community property (R. 10-12). Both of the parties have assumed, as in the typical case, that all of the community property was acquired with the decedent-husband's earnings (Appellant's Br. 10; Appellees' Br. 7), and the United States as *amicus curiæ* takes the case as it finds it. As a practical matter there can be no real doubt that all the property was so acquired. The appellees have never contended that any part of the community property is excluded from the decedent's gross estate by the express terms of Section 402 (b) of the Revenue Act of 1942, as would

his death, under Louisiana law, one-half of the net community property remaining after the payments of debts and charges belonged to the surviving wife. The remaining one-half was subject to the decedent's testamentary disposition and under his will went to three of his sons.[2] These sons, referred to in Louisiana as the universal legatees and heirs, are the appellees here. (R. 10–11.)

The State of Louisiana has imposed not a single death duty, but two such taxes. The universal legatees and heirs of the decedent, proceeding under Section 7 of Act No. 127, Louisiana Acts (1921, Extra Session), p. 323, as amended by Section 1 of Act No. 44, Louisiana Acts (1922), p. 80 (Louisiana Code of Practice, Art. 996.70, Appendix, *infra*), asked only for a determination of the amount of *inheritance* taxes due the State under that statute on their father's half-interest in community property which was bequeathed to them under the terms of his will. (R. 6–7, 19.) The tax

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any part traceable to the surviving wife's earnings or separate property; nor have they contended that any part should be excluded under the terms of the federal statute as incorporated into the Louisiana inheritance or estate tax laws.

[2] It is well settled that upon the death of one of the spouses title to one-half of the Louisiana community property vests in the decedent's heirs or legatees and title to the other half remains in the surviving spouse where it was already vested, subject in both cases to the payment of community debts. *Ramsey* v. *Beck*, 151 La. 190; *Jeanfreau* v. *Jeanfreau*, 187 La. 939. See also *Bender* v. *Pfaff*, 282 U. S. 127, and *De Lappe* v. *Commissioner*, 113 F. 2d 48 (C. C. A. 5th).

imposed by Act No. 127 is upon all inheritances, legacies, and donations and gifts made in contemplation of death to the extent not specifically exempted by the act and the rates are prescribed in the act. Section 2 of Act No. 127 (Louisiana Code of Practice, Art. 996.65, Appendix, *infra*). It is a tax upon the privilege of receiving property by will, or by inheritance and is payable by the heirs, legatees and donees with respect to property which they thus acquire. *Succession of Cotton*, 172 La. 819; *Succession of Stauffer*, 139 La. 66; *Succession of May*, 120 La. 692; *State* v. *Succession of Brewer*, 190 La. 810. See also *Scholey* v. *Rew*, 23 Wall. 331; *Knowlton* v. *Moore*, 178 U. S. 41. This taxing statute makes no mention of the federal estate tax law or of Section 402 (b) of the Revenue Act of 1942 and is not affected in any way by that provision.

A second death duty was imposed by Act No. 119 of Louisiana Acts (1932), p. 415 (Louisiana Code of Practice, Art. 996.89–996.94, Appendix, *infra*). Section 1 of that Act (Louisiana Code of Practice, Art. 996.89) provides that "in addition to the inheritance tax as now provided by Act No. 127 of 1921, as amended by Act 44 of 1922," there shall be levied "an estate transfer tax upon all estates which are subject to taxation under the Federal Revenue Act of 1926." Section 2 (*ibid.*, Art. 996.90) prescribes the measure of the tax by providing that whenever the aggregate amount of all inheritance, succession, legacy, and estate

taxes actually paid to the several states of the United States in respect to any property owned by the decedent shall be less than 80% of the estate tax payable to the United States under the provisions of the Revenue Act of 1926, the difference between that amount and 80% shall be paid to Louisiana." The declared purpose of the legislature in enacting this statute was to secure for the state the benefit of the credit allowed under Section 301 (b) of the Revenue Act of 1926 by imposing additional taxes. Section 4 of the Act (Art. 996.92, Louisiana Code of Practice, Appendix, *infra*).

The heirs and universal legatees had ruled the tax collector to fix the amount of "inheritance tax due to the State of Louisiana" but made no reference to the "estate transfer tax" imposed by Act No. 119 even if they might have done so by virtue of Section 3 of that Act (Louisiana Code of Practice, Art. 996.91, Appendix, *infra*), providing that "in so far as applicable" the provisions of Act No. 127, as amended, should regulate the

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It is generally held that such a tax is not an inheritance but an estate tax, which, similarly to the federal estate tax (*New York Trust Co.* v. *Eisner*, 256 U. S. 345), is imposed upon the estate of a decedent in respect of his privilege of transmitting the estate at his death. See *Haggod* v. *Doughton*, 195 N. C. 811; *Brown* v. *State*, 323 Mo. 138; *Highfield* v. *Del. Trust Co.*, 34 Del. 306; *In re Knowles's Estate*, 295 Pa. 571; *Commonwealth* v. *Davis' Estate*, 345 Pa. 284; *Matter of Thalmann*, 177 Misc. 1055. See also *In re Opinion of Justices*, 85 N. H. 572. Cf. *State* v. *Wiess* (S. Ct. Texas), decided June 23, 1943 (171 S. W. 2d 848).

proceedings for the determination and collection of the tax imposed by Act No. 119. It appears, however, that in answering the rule to determine the inheritance tax imposed under Act No. 127, the tax collector claimed that the appellees as their father's heirs owed an inheritance tax measured by the entire community estate of the decedent and their mother, rather than by the one-half of such estate which they had inherited from the decedent (R. 8, 19). The tax collector assigned as a reason therefor that in Section 402 (b) of the Revenue Act of 1942 (Appendix, *infra*) Congress had required that there be included in the decedent's estate for federal estate tax purposes the entire community interest of the decedent and his wife at the time of his death and that the Louisiana Legislature had in Section 2 of Act No. 119 (Louisiana Code of Practice, Art. 996.90) provided that the state *inheritance* tax (imposed by Section 2 of Act No. 127) should be at least 80% of the estate tax payable to the United States. He asked that upon the determination of the net value of the estate, there be a judgment for the state in an amount equal to 80% of the tax due the Federal Government under the basic federal estate tax act.[1] Revenue Act of 1926, c. 27, 44 Stat. 9.

[1] The estimated federal estate tax was computed under the Revenue Act of 1926 on the basis of a net estate of $808,272.46, a valuation arrived at by deducting from the community estate all debts and charges including the fed-

The appellees then interposed a plea challenging the constitutionality of Section 402 (b) of the Revenue Act of 1942 (R. 9–10). An agreed statement of facts was filed (R. 10–12) in which it was set forth that the net value of the entire community after payment of debts, succession charges and *taxes*, state and federal, was $608,272.46 (R. 11). It was agreed that if the collector's position were sustained, the heirs would owe an inheritance tax of $14,330.90, and that if the heirs were sustained, they owed $8,224.09 (R. 12). It was further agreed that if the federal officials should increase the valuation of the estate or decrease the deductible indebtedness, the state might secure an additional judgment (R. 12). And it was stipulated that in computing the net estate a tentative federal tax had been deducted, since the heirs contended that the tax should be deducted in computing the inheritance tax, but that the collector retained the right to contest the issue in subsequent proceedings (R. 12).

The Louisiana District Court held that so much of the Revenue Act of 1942 as seeks to subject to the federal estate tax, and consequently makes subject to the state inheritance tax under Act No.

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eral tax and state tax (R. 11-12). Allowing an exemption of $100,000, the federal estate tax on a net estate of $608,272.46 would be $17,913.62. See Section 301 of the Revenue Act of 1926. The sum of $14,330.90 which the collector determined as the inheritance tax due is 80% of $17,913.62.

119, as amended, property in which the surviving wife had a vested and present interest prior to her husband's death violated the uniformity clause of Article I, Section 8 of the Constitution and the due process clause of the Fifth Amendment (Appendix, *infra*). It concluded that the inheritance tax due by the heirs and legatees, who were plaintiffs under the rule, might be based only on one-half of the community property owned by the decedent at and prior to his death which was transmitted to his heirs, and gave judgment to the collector for $8,224.09. There was reserved to the state collector the right in further and supplemental proceedings to avail himself of the reservation contained in the agreed statement of facts. (R. 13–14.) Evidently the trial court assumed that Act No. 119 imposed an inheritance tax which served merely to increase the inheritance tax imposed by Section 2 of Act No. 127 and that the tax thus increased was imposed on the universal legatees and heirs.

After the case was appealed to the Supreme Court of Louisiana, the Attorney General of the United States was notified by the court that the issue of the validity of a provision of the Revenue Act of 1942 had been drawn into question in the case (R. 16–17) and a brief as *amicus curiae* was filed in behalf of the Government. After the argument of the case, the universal legatees and heirs filed an amended plea of unconstitutionality

in which it was claimed not only that Section 402 (b) was invalid, but also that if the state statute, either alone or in conjunction with the federal statute, were construed as imposing an inheritance tax based upon or measured by the entire community estate, the statute would be violative of the due-process clause of the Fourteenth Amendment (R. 17–18). It was asserted in the plea that the issue was raised for the reason that the Attorney General had contended that the only tax liability involved was that imposed by the state and that the validity of the federal law was not in issue. The tax collector agreed to the consideration of the amended plea. (R. 18.)

The court below held that since the wife has a vested interest in one-half of the community property, the construction placed by the tax collector upon Act No. 119, namely, that in arriving at the amount of inheritance taxes due by the plaintiffs there should be included in the measure of the tax not only the half-interest in the community property willed to them by their father but also the half-interest belonging to their mother, would violate the due-process clause of the Fourteenth Amendment of the Constitution of the United States (citing *Hooper* v. *Tax Commission*, 284 U. S. 206) (R. 22). It was not content, however, to stop there, but held further that since the limitation placed upon the states by the Fourteenth Amendment is likewise placed on the Federal Gov-

ernment by the Fifth Amendment (citing *Nichols v. Coolidge*, 274 U. S. 531) (R. 23). Section 402 (b) of the 1942 Act was invalid. The judgment of the lower court was affirmed (R. 30) and a petition for rehearing was denied July 13, 1943 (R. 30–31). The order of the Chief Justice of the Supreme Court of Louisiana allowing the appeal states that the validity of Section 402 (b) of the Revenue Act of 1942 was drawn into question in the case and that the decision was against its validity (R. 33).

B. THE APPEAL SHOULD BE DISMISSED

The state tax collector invokes the appellate jurisdiction of this Court solely on the ground that the court below has held Section 402 (b) of the Revenue Act of 1942 invalid, under the Fifth Amendment, and that the result of its decision is to deny effect to that section in the computation of the basic federal estate tax and consequently in the computation of the inheritance tax due Louisiana, which under the state law is required to be 80% of the basic federal estate tax. (R. 32, 33.) Under Section 237 (a) of the Judicial Code, as amended, the Court has jurisdiction to review the final judgment of the highest court of a state when there "is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity." The phrase "drawn in question" means brought forward and made the ground of decision. *Champion Lumber*

Co. v. *Fisher*, 227 U. S. 445; *Minnesota* v. *National Tea Co.*, 309 U. S. 551. By force of Section 237 (c), the appeal papers may be treated as a petition for certiorari under Section 237 (b). The latter subsection will support review by certiorari where a state statute has been held invalid under the Fourteenth Amendment. It would appear, however, that this subsection is of no avail in the instant case, since the appeal papers make no claim that the decision of the court below is grounded upon a holding that the state statute is invalid under the Fourteenth Amendment. It is settled that review on certiorari is limited to questions presented by the petition for the writ. *Crown Cork Co.* v. *Gutmann Co.*, 304 U. S. 159; *Morehead* v. *N. Y. ex rel. Tipaldo*, 298 U. S. 587; *Helvering* v. *Hutchings*, 312 U. S. 393; *Gunning* v. *Cooley*, 281 U. S. 90. The question, therefore, is whether the court below rested its decision on the invalidity of the federal statute, so that the appeal will lie under Section 237 (a). The matter is not free from doubt, but we believe that the court did not do so and that the appeal cannot be maintained.

1. There is an initial question as to the precise issue which the court below decided with respect to the state law. As will be seen from the foregoing statement (*supra*, pp. 3, 5–6), the issue raised by the pleadings was apparently whether the universal legatees and heirs could be required to pay

an inheritance tax on the one-half of the community property which went to the widow, without regard to whether the widow herself might have been required to pay an inheritance tax on the share taken by her or whether a Louisiana estate tax might include the widow's share within the decedent's estate for tax purposes. This question, if pressed and decided, might have been resolved either on a construction of the Louisiana statute alone,[*] or under the Fourteenth Amendment. It is not clear, however, that this question was in the case as presented, for the reason that the universal legatees and heirs stipulated, referring to the basic federal estate tax, that they "do not contest their legal liability for eighty per cent of such tax as may be lawfully due" (R. 11). At some places in the opinion the court seems to consider only the question whether the universal legatees and heirs could be taxed on property which they did not receive (R. 20, 21, 29–30). Elsewhere the court appears to decide the case on

[*] Act No. 127 had been construed as not imposing an inheritance tax on the interest of the surviving wife since she does not take her interest by inheritance from her husband. See *Grace* v. *W. G. Bagley Lumber Co.*, 154 La. 965. Two courts have concluded that not all property included in the measure of the federal tax is to be included in the measure of the state "take-up" tax. See *Highfield* v. *Del. Trust Co.*, 34 Del. 306, and *Commonwealth* v. *Dietz's Estate*, 345 Pa. 284, holding that property included within the gross estate of a donee by virtue of his exercise of a general power of appointment is not to be included within the measure of the state tax.

the broader proposition that the Fourteenth Amendment precludes a state from imposing an estate or inheritance tax with respect to the share of community property belonging to the surviving spouse (R. 13, 21–22, 23–29). If the first theory of the court's decision is correct—that is, if the decision below is limited simply to the point that the universal legatees and heirs could not be taxed on the share of the community property which went to the widow—then very clearly the case did not turn on any question involving the federal statute under the Fifth Amendment. The federal tax is an *estate* tax, payable from the whole estate, and does not impose any burden on the appellees with respect to property they do not receive. (*Infra*, pp. 20–21.) But if the view is correct that the broader question was decided, we nevertheless believe that decision did not turn on the validity of the federal statute under the Fifth Amendment.

2. The case involves not federal but state taxes. The ultimate question at issue, the amount of the liability, was settled by the court's holding that if the state statute were construed so as to include the widow's share within the measure of the state inheritance or estate tax, the statute was invalid under the Fourteenth Amendment (R. 22, 29–30). This holding raised no question under the Fifth Amendment.[1] The court did not hold that the state

[1] It seems clear that the question as to the validity of the state statute, under the Fourteenth Amendment, if construed as the tax collector construed it, is not so related

statute was dependent for its operation on the federal statute, so that, as a matter of construing the state law, the case turned on the validity of the federal act under the Fifth Amendment. Rather, the court took as its starting point simply the construction of the state statute tendered by the tax collector (R. 21), and its decision that this construction ran counter to the Fourteenth Amendment disposed of the case. It is true, of course, that the state tax collector was impelled to contend for the construction of the state statute advanced by him because of the enactment of Section 402 (b) of the Revenue Act of 1942. But the fact that the enactment of the federal statute provided the motive for the tax collector in arguing for this particular construction did not make the federal law the basis of decision. As pointed out by Mr. Justice Cardozo in *Gully v. First Nat. Bank*, 299 U. S. 109, 115: "Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit."

3. Having held that the state statute as construed by the tax collector was invalid under the Fourteenth Amendment, the court then considered

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to the question of the validity of Section 402 (b) of the Revenue Act of 1942 as to require that the validity of both be determined in the same proceeding. Cf. *State Tax Comm'n v. Van Cott*, 306 U. S. 511.

Even if the court had adopted this approach, it is probable that an appeal could not be maintained. See *Miller's Executors v. Swann*, 150 U. S. 132; *Louisville & Nash. R. Co. v. West. Un. Tel. Co.*, 237 U. S. 300. Cf. *Carmichael v. Southern Coal Co.*, 301 U. S. 495, 507.

Section 402 (b) of the Revenue Act of 1942 and declared that it was invalid under the Fifth Amendment (R. 23, 25). But at this point the case had already been decided. Accordingly, the case was disposed of before the only federal question raised on this appeal was reached. The state court in effect held that Section 402 (b) of the Revenue Act of 1942 was not to be incorporated by reference into the state law and whether or not that section was invalid then became immaterial. The decisive fact would seem to be that the appellant, in his appeal to this Court, raises no issue other than the validity of Section 402 (b) under the Fifth Amendment, and that the decision below rests on an independent ground, namely the asserted invalidity of the Louisiana statute under the Fourteenth Amendment. See *Lynch* v. *New York*, 293 U. S. 52; *Broad River Co.* v. *So. Carolina*, 281 U. S. 537; *McCoy* v. *Shaw*, 277 U. S. 302; *Richardson Mach. Co.* v. *Scott*, 276 U. S. 128; *Fox Film Corp.* v. *Muller*, 296 U. S. 207.*

In addition, there are strong practical considerations which oppose review. The only tax that

* The statement of the Chief Justice of the Supreme Court of Louisiana in the order allowing the appeal that an issue as to the validity of Section 402 (b) of the Revenue Act of 1942 was drawn into question and the decision was against its validity must, in view of the opinion, be interpreted as meaning merely that the issue was raised and decided. In any event the statement is not controlling. See *Honeyman* v. *Hanan*, 300 U. S. 14; *Commercial Bank of Cincinnati* v. *Buckingham's Executors*, 5 How. 317.

will be directly affected by this Court's holding that Section 402 (b) of the Revenue Act of 1942 is valid or invalid is the federal estate tax. This is a tax not involved in the present proceeding. Questions as to the validity and application of this tax can be satisfactorily determined only in a proceeding for the collection of the federal tax where the Federal Government is a party, has a hand in shaping the record, and the court is exclusively concerned with the requirements of federal law. The instant case is a plain example of the confusion which is likely to result if the validity and application of federal tax laws are decided tangentially, in cases where the principal issue concerns the validity and application of state tax laws. The court below seems to have been influenced by the notion that the burden of any tax, whether state or federal, would have to be borne by the universal legatees and heirs (R. 20, 21, 29–30). The court seems to have failed to understand that the federal estate tax is collectible from the entire gross estate, including all of the community property which may be validly included within it (*infra*, pp. 20–21). Nor, whatever the view which the court below took of the case, was it necessary for it to consider the validity and application of the federal law prior to the determination of the amount of the federal estate tax

by the Bureau of Internal Revenue and, if necessary, by the federal courts.[9] Thus, considerations of public policy should have prevented the state court from deciding in this proceeding that the federal statute is invalid. Cf. *Great Lakes Co.* v. *Huffman*, 319 U. S. 293; *Burford* v. *Sun Oil Co.*, 319 U. S. 315. It is true that the state court has now decided that the federal statute is invalid. This, however, will not bind the Federal Government in any subsequent action to collect the federal estate tax from the decedent's estate.

For these reasons we believe that the instant appeal cannot be maintained under Section 237 (a) of the Judicial Code.

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[9] The decision of the validity of the federal statute here was unnecessary because of the ground on which the court based its decision. But even assuming that the court had considered that the operation of the state law was dependent upon the validity of the federal law, decision as to the validity and application of the federal estate tax could, and we submit should have been postponed until the determination of the federal tax due by the Bureau of Internal Revenue and the resolution of any controversy which might have then arisen through the normal channels. The precipitate action of the state court in deciding the validity of the federal statute has not, in fact, served to dispose even of the present controversy as to the total state tax liability. On the contrary, there has been merely a tentative computation of the state tax, the tax collector reserving the right to assert a further claim *after* the adjustment of certain items and on final determination of the federal tax (R. 12).

II

Section 402 (b) of the Revenue Act of 1942 is Constitutional

In the event that this Court should take the view that the constitutionality of Section 402 (b) of the Revenue Act of 1942 was necessarily drawn into question and decided in this proceeding, and that the Court has jurisdiction of the appeal, we submit that the validity of that section must be sustained.

Section 402 (b) of the Revenue Act of 1942 amended the title of Section 811 (e) of the Internal Revenue Code (Appendix, *infra*) so as to refer to community interests as well as joint interests, and added to the section subdivision (2) requiring the inclusion in the gross estate of the value of property:

> To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community prop-

erty as was subject to the decedent's power of testamentary disposition.

The avowed purpose of Congress in enacting this and certain other amendments[8] to the estate and gift tax law was to eliminate what it regarded as special tax privileges enjoyed by residents of community property states, and thus to establish an estate and gift tax system more nearly based on ability to pay.[9] Section 402 (b) rests on the

[8] See Sections 402 (a), 404 and 453 of the Act.

[9] H. Rep. No. 2333, 77th Cong., 2d Sess., p. 35; S. Rep. No. 1631, 77th Cong., 2d Sess., p. 231. The House Report gives tables showing the tax savings effected by spouses domiciled in the community property states. This matter has repeatedly been called to the attention of Congress. It was the subject of special inquiry at hearings entitled "Community Property Income," before a Subcommittee of the Committee on Ways and Means, House of Representatives, 73d Cong., 2d Sess., on H. R. 8396, held in May and June 1934. At these hearings L. H. Parker, then Chief of Staff of the Joint Committee on Internal Revenue Taxation, submitted a comprehensive memorandum, set out at pages 15-22, inclusive, of these hearings. Mr. Parker there made the following statement as regards the estate tax advantages of the husband and wife in community property states (p. 17):

"The husband and wife with substantial property in a community property State also enjoy a great advantage over married persons in other States in that there is no estate tax imposed on one half of the property of the husband acquired after marriage and passing to the wife.

"For instance, suppose we have a man, wife, and son living in a community property State. Assume the man has accumulated $2,000,000. On his death $1,000,000 passes to the wife without tax and there will be a tax of $117,500 on the $1,000,000 passing to the son. If the wife now dies, there will be a tax of $117,500 on her estate passing to the son. The total estate tax, then, on $2,000,000 passing eventually to the

premise that the alteration effected by the death of one spouse on the community interests of both furnishes an appropriate occasion for the imposition of a federal estate tax measured by the entire community estate, except to the extent that it was actually earned by the survivor or was traceable to income from his or her separate property. There is a qualification that the property subject to the decedent's testamentary power, normally one-half, is always includible.

The tax assessed on this basis is an obligation of the estate (Internal Revenue Code, Section 822), to "be paid out of the estate as a whole" (*Riggs* v. *Del Drago*, 317 U. S. 95, 97). By force of Section 827 (a) of the Internal Revenue Code, the tax becomes a lien upon all property includible in the "gross estate of decedent" (*Detroit Bank* v. *United States*, 317 U. S. 329, 332–333), and thus on the community property brought within the "gross estate" by Section 811 (e), as amended, including the share of the community property taken by the surviving spouse. Section

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son will be $235,000 in a community-property State. On the other hand, in a non-community-property State there will be an estate tax of $315,500 collected on the death of the husband. If the widow receives $1,000,000 of the estate and she dies after 5 years, leaving her property to the son, there will be a further tax of $117,500. Therefore, the total tax in a non-community-property State in such a case is $433,000 against $235,000 in a community-property State; that is, there is 84 percent more tax collected in the non-community-property State."

827 (b), as amended by Section 411 of the Revenue Act of 1942, explicitly provides that if the estate tax is not paid when due—

> then the spouse, * * * who receives, or has on the date of the decedent's death, property included in the gross estate under section 811 * * * (e) * * *, to the extent of the value, at the time of the decedent's death, of such property, shall be personally liable for such tax.

Upon sale by the surviving spouse "to a bona fide purchaser for an adequate and full consideration in money or money's worth," such community property is "divested of the lien provided in section 827 (a)" but "a like lien" then attaches "to all the property of such spouse."[12]

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[12] In view of these provisions, appellees' contention (Br. 28–30; also see Br. 10–11, 27–28, 31–33; Brief of Brady et al. as *amici curiae*, 23, fn. 11) that the federal law requires the beneficiaries under the decedent-spouse's will to bear the weight of the entire estate tax is plainly erroneous. (1) The claim that the federal statutes provide no method of enforcing the lien on the surviving spouse's share (Appellee's Br. 28) overlooks R. S., 3207 (Internal Revenue Code, Section 3678). This was the section utilized to enforce the lien on the entirety property involved in the *Detroit Bank* case (317 U. S. at p. 331). As to enforcement of the personal liability of the surviving spouse, see Internal Revenue Code, Section 900. (2) The claim that the federal law requires that the surviving spouse be reimbursed for the part of the estate tax paid with respect to the property taken by him or her (Appellee's Br. 29) flies in the face of Section 827 (b), quoted above. The reimbursement provision of Section 826 (b) is in aid, rather than derogation, of Section 827 (b), for its purpose is simply to assure that, so far as the federal law is

All of the community property here involved is assumed to be attributable to the earnings of the decedent-husband. The heirs and legatees make no contention that Congress may not tax the one-half of the value of the community property over which the decedent had the power of testamentary disposition. The power of Congress in this respect has never been seriously challenged. (See *infra*, pp. 43–44.) The argument here is that the surviving wife has a vested half-interest in all community property, however acquired, and that to measure the husband's estate tax by that half, even though the community property owned at the time of death had its origin in the decedent-husband's earnings or income from his separate estate,[1] is to violate the Fifth Amendment to the Constitution.[2]

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concerned, all parts of the gross estate bear their proportionate burden. See *Riggs* v. *Del Drago*, 317 U. S. at pp. 100–101. The language of Section 826 (b)—"that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution"—is probably applicable literally to the community property interest of the surviving spouse in Louisiana, since his or her sole ownership right attaches only to one-half of the residue of the property remaining after the death of the other spouse. (*Infra*, pp. 32–33.) If the widow here can recover from the heirs and universal legatees any payment of the tax not in excess of her proportionate share, it is by virtue of their agreement to accept the succession and thus to become liable for the tax (R. 11) and not by virtue of Section 826 (b).

[1] In Louisiana the community property includes all property acquired by either spouse during marriage other than property acquired with separate funds or by inherit-

The Government does not deny that in Louisiana the wife has such a "vested interest,"[1] though it

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ance or by donation made to husband or wife particularly. It includes the profits and revenues derived from community property, the earnings of husband and wife (except earnings of the wife or profits of a business conducted by her while she is living separate and apart from her husband), and revenues and profits of the separate property of *both* spouses except those from the wife's paraphernal property where such property is administered by the wife separately. See Articles 2334, 2335, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2402 of Louisiana Civil Code, Annotated (Dart; 1932). The proceeds of the sale of separate property, however, are separate property. *Beals* v. *Fontenot*, 111 F. 2d 956 (C. C. A. 5th).

[1] The ephemeral character of such an interest should, however, be noted. That the term "vested interest" is lacking in substance as applied to community property, is well illustrated by the cases dealing with California law. The rights of the husband in California were originally considered to be such as to require the inclusion of all the income in his gross income for income tax purposes, on the theory that the wife did not have a vested one-half interest therein. See *United States* v. *Robbins*, 269 U. S. 315; *Blair* v. *Roth*, 22 F. 2d 932 (C. C. A. 9th), certiorari denied, 277 U. S. 588; *Pedder* v. *Commissioner*, 66 F. 2d 866 (C. C. A. 9th); *Hirsch* v. *United States*, 62 F. 2d 128 (C. C. A. 9th) certiorari denied, 289 U. S. 735; *United States* v. *Pettigrew*, 81 F. 2d 666 (C. C. A. 9th); *Poelin* v. *Commissioner*, 82 F. 2d 731 (C. C. A. 9th). For the same reason community property was included in the husband's gross estate under Section 302 (a) of the Revenue Act of 1926 or similar provisions of earlier acts. *Tyler* v. *United States*, 23 F. 2d 897 (C. C. A. 9th), certiorari denied, 277 U. S. 604; *Title Insurance & Trust Co.* v. *Gaydell*, 60 F. 2d 863 (C. C. A. 9th), certiorari denied, 288 U. S. 613. In 1917 and 1923, California made certain amendments to her Civil Code which enabled the wife to dispose of one-half of the community property by will and required that she join in any conveyance of com-

may be noted that the Louisiana courts have not always so held. See *Guice* v. *Lawrence*, 2 La. Ann. 226, which was overruled in *Phillips* v. *Phillips*, 160 La. 813, 826–827. See also *Bender* v. *Pfaff*, 282 U. S. 127.

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munity real estate. See Sections 172a and 1401 of the Civil Code of California (1929). It was nevertheless held that she had not acquired a vested interest in community property. *Stewart* v. *Stewart*, 199 Cal. 318; *Spreckels* v. *Spreckels*, 116 Cal. 339; *Hirsch* v. *United States*, *supra*; *Gillis* v. *Welch*, 80 F. 2d 165 (C. C. A. 9th), certiorari denied, 297 U. S. 722. It required only a simple statute, enacted July 29, 1927, declaring that her interest was a "present, existing and equal" interest (California Civil Code (1929), Section 161a) to change all this. See *United States* v. *Pettigrew*, *supra*. Thereafter this Court held that the husband was required to return only one-half of his earnings thereafter acquired (*United States* v. *Malcolm*, 282 U. S. 792) and the Circuit Court of Appeals for the Ninth Circuit held that only one-half of the value of community property acquired subsequent to July 29, 1927, was required to be included in the gross estate (*United States* v. *Goodyear*, 99 F. 2d 523; *Welch* v. *Sampson*, decided October 29, 1943, not yet reported, affirming, *per curiam*, 40 F. Supp. 1014 (S. D. Cal.)). Indeed, in the cases last cited the court held that where the husband and wife had agreed that community property acquired *prior* to the 1927 amendment should have the characteristics of property acquired thereafter, only one-half of such property was includible in the husband's gross estate. And this remarkable change in tax consequences has been achieved despite the refusal of the Supreme Court of California to rule that any change of substance has been effected by the 1927 amendment, or even to rule that the wife's interest is now to be termed a "vested" interest. See *Grolemund* v. *Caffarata*, 17 Cal. (2d) 679, certiorari denied, 314 U. S. 612; *Estate of Coffee*, 19 Cal. (2d) 248.

The question arising under the Fifth Amendment, therefore, is whether Congress has the power to assess a tax against a decedent-husband's estate measured by the full value, rather than only one-half of the value, of community property attributable to his earnings, notwithstanding the fact that prior to his death the surviving wife had a vested, undivided one-half interest therein. Stated otherwise, the question is whether such a tax levied by Congress is so arbitrary and unreasonable in the circumstances here existing as to require this Court to declare it null and void under the Fifth Amendment. The argument for appellees is grounded on the proposition that A may not be taxed on the property of B. But this general proposition is of little aid in deciding concrete cases. It is clear that there need be no technical passing of title from the decedent to the survivor in order to bring the property within the former's gross estate. The test instead is whether, notwithstanding that the surviving spouse had a "vested," undivided community interest, the rights of the spouses in the property were sufficiently altered by the death of the decedent to justify the imposition of the tax. The cases establish this test and, we submit, resolve the instant controversy by sustaining the statute.

The due process test. In *Tyler* v. *United States*, 281 U. S. 497, the question was whether Congress had the power to include within a decedent's

gross estate the full value of property held by him and his wife as tenants by the entirety (excluding that portion originally owned by the survivor above). *It was argued that an estate tax* based on inclusion in his estate of the value of property so held was one on property which the survivor had prior to the decedent's death and was therefore a direct tax on property and violative of Article I, Section 8, of the Constitution, requiring apportionment of direct taxes. It was argued, further, that the statute violated the due process clause of the Fifth Amendment. In answer the Court observed, respecting the nature of the Congressional power to levy estate taxes, that (p. 502):

> If the event is death and the result which is made the occasion of the tax is the bringing into being or the enlargement of property rights, and Congress chooses to treat the tax imposed upon that result as a death duty, even though, strictly, in the absence of an expression of the legislative will, it might not thus be denominated, there is nothing in the Constitution which stands in the way.

The issue presented by the case was then stated as follows (p. 503):

> The question here, then, is, not whether there has been, in the strict sense of that word, a "transfer" of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death

> has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit), to be measured, in whole or in part, by the value of such rights.

The answer was given in the following language (pp. 503–504):

> Before the death of the husband (to take the *Tyler* case, No. 428,) the wife had the right to possess and use the whole property, but so, also, had her husband; she could not dispose of the property except with her husband's concurrence; her rights were hedged about at all points by the equal rights of her husband. At his death, however, and because of it, she, for the first time, became entitled to exclusive possession, use and enjoyment; she ceased to hold the property subject to qualifications imposed by the law relating to tenancy by the entirety, and became entitled to hold and enjoy it absolutely as her own; and then, and then only, she acquired the power, not theretofore possessed, of disposing of the property by an exercise of her sole will. Thus the death of one of the parties to the tenancy became the "generating source" of important and definite accessions to the property rights of the other. These circumstances, together with the fact, the existence of which the statute requires, that no part of the property originally had be-

> longed to the wife, are sufficient, in our opinion, to make valid the inclusion of the property in the gross estate which forms the primary base for the measurement of the tax. * * *

Accordingly, it was held that the inclusion of the full value of the tenancy by the entirety property in the decedent's estate violated neither the apportionment requirement nor the due process clause of the Fifth Amendment.

Thus, the power of Congress with respect to the permissible tax base for purposes of estate taxation is not limited to property "owned" by the decedent at the time of his death as to which there is a transfer in a technical sense. Upon the death of a holder by the entirety there is not technically, from the conveyancer's point of view, any transfer of title or of estate to the survivor, since the survivor throughout the tenure has been seized *per tout et non per mug.* Nevertheless, the Court held that the value of co-owned property might be included in the tax base for the reason that substantial rights and powers were transmitted to the survivor on the decedent's death.

This decision makes it clear, therefore, that the mere fact that the wife's interest is a vested interest during her husband's lifetime does not preclude Congress from imposing a tax on the total value of community property. *Poe* v. *Seaborn*, 282 U. S. 101, and *Bender* v. *Pfaff*, 282 U. S. 127, holding that the federal income tax laws in

pose income taxes according to ownership of income and hence, that the husband can not be taxed on the whole of such income, are clearly of no weight in determining the issue here. Those cases turned on the construction of the language of the taxing statutes imposing a tax on the net income "of every individual" (see Section 22 (a) of the Internal Revenue Code) and presented no question of Congressional power. Here, on the contrary, there is no question but that Congress intended to include the property involved in the measure of the estate tax and the sole question is whether the provision is constitutional. Likewise irrelevant is *Hooper* v. *Tax Commission*, 284 U. S. 206, to the effect that due process forbids taxing A on the income of B. That case dealt not with community or co-owned property, but with the separate property of the wife; under the law of Wisconsin the wife exercised the same rights of management and control with respect to her separate property as if she were single. But an estate tax may be levied against A's estate on the basis of the full value of co-owned property if substantial rights and powers respecting the whole property accrue to the survivor on A's death.

These principles were again vindicated in *United States* v. *Jacobs*, 306 U. S. 363. There, inclusion in the decedent's estate of the full value of property held in joint tenancy with his wife was sustained on the same reasoning as that employed in *Tyler* v. *United States*, *supra*. It

was pointed out that (p. 371) "There was—at his [the husband's] death—a distinct shifting of economic interest, a decided change for the survivor's benefit." The argument that the *Tyler* case was distinguishable because it involved a tenancy by the entirety and under such a tenancy the wife had no power to sever the tenancy by making a conveyance of her interest was rejected. The joint tenancy, moreover, had been created prior to the enactment of the federal estate tax law. An argument that the tax as applied to such a tenancy was retroactive and therefore violative of the Fifth Amendment was dismissed with the observation that the tax was on a shift of interests that took places after enactment of the taxing statute.

Earlier cases had decided that the Fifth Amendment does not bar the inclusion in the decedent's gross estate of the value of property which the decedent has ceased to own but as to which he retains until his death the right to change the enjoyment. *Chase Nat. Bank* v. *United States*, 278 U. S. 327; *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339; *Porter* v. *Commissioner*, 288 U. S. 436. The inclusion in the donee's gross estate of property passing under the exercise of a power of appointment rests upon similar principles. *Whitney* v. *Tax Commission*, 309 U. S. 530; *Helvering* v. *Grinnell*, 294 U. S. 153; *Rogers* v. *Helvering*, No. 66, this Term, decided December 6, 1943. And while *Helvering* v. *Hallock*, 309 U. S. 106, in-

volved a question of statutory construction rather than one of Congressional power, the Court in that case again made it clear that the scope of the federal estate tax law is not to be circumscribed by technicalities of title and that it reaches all property in which the decedent has retained until his death an interest, whether vested or contingent, or some dominion which renders the gift incomplete until death.[15]

"It is as unimportant here as it was in the cases just discussed that there was no "transfer" to the survivor. The question is whether or not the death of the decedent brought into being or ripened for the survivor property rights of such character as to make appropriate the imposition of a death duty. The test is a practical one, to be determined not by labels or descriptive phrases used to describe the wife's interest under community property law (*Morgan* v. *Commissioner*, 309 U. S. 78, 626; *Tyler* v. *United States*, *supra*)

[15] These cases do not, of course, mark the outer limits of Congressional power. There may be included in the measure of the tax gifts which are deemed complete when made such as gifts in contemplation of death (*Milliken* v. *United States*, 283 U. S. 15) and transfers in trust subject to revocation or modification only with the consent of the beneficiary (*Helvering* v. *City Bank Co.*, 296 U. S. 85), at least where statutory provision requiring the inclusion or a similar provision was in effect when the transfer was made. Such cases rest upon the principle of bringing within the scope of the tax to avoid evasion transfers sufficiently akin to testamentary transfers to be classified with them.

but rather by actualities. In terms of the present case, the basic question, therefore, is whether by virtue of the decedent's death the wife acquired substantial rights with respect to her interest in community property which she had not previously enjoyed.

The wife's interest under Louisiana community property law.—Prior to the husband's death the wife's so-called "vested" right consists chiefly of her right to receive one-half of any community property in existence at the dissolution of the community by death or by divorce (for whatever cause), subject to community obligations. Articles 2406, 2409–2413 of the Louisiana Civil Code, Appendix, *infra*.[16] This is a right, not in specific

[16] The court below stated (R. 28) that the wife might, without securing a divorce, and even in the absence of fraud, sue for a dissolution and liquidation of the community partnership and secure the delivery into her own exclusive management and control of her half of the community property whenever her husband proved to be incompetent, a bad manager, or of a reckless and speculative disposition, or whenever his affairs were in such disorder that her property rights were jeopardized. See also *Bender* v. *Pfaff*, *supra*. It should be noted, however, that Article 2425 of the Civil Code (*Appendix*, *infra*) provides merely that the wife may apply for a separation of property when her dowry is in danger owing to his mismanagement or when the disorder of his affairs induces her to believe that his estate may not be sufficient to meet her rights and claims. The provision is primarily designed to preserve her separate estate. See *Jones* v. *Jones*, 119 La. 677; *Darrick* v. *Darcy*, 6 Robinson 342. While it has been held that she might sue him for a separation of property, even though she had no dowry or paraphernal prop-

property, but in a residue. *Tomme* v. *Tomme*, 174 La. 123; *Kelly* v. *Kelly*, 131 La. 1024. The wife has no right during the existence of the community to enjoy or dispose of her half-interest in any community property or income. Each spouse has certain rights which extend to the whole property, but the wife cannot, during the existence of the community, secure any definite part of the community property or income for her own unrestricted use and enjoyment. Indeed, the husband has the sole management of the property and income (Article 2404, Louisiana Civil Code, Appendix, *infra*), and administers it as he pleases without any liability to account to her for its administration. *Frierson* v. *Frierson*, 164 La. 687.

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erty, where he was insolvent and her earnings were needed for the support of the family (*Cavitt* v. *Trotat*, 105 U. S. 751; *Gastamer* v. *Gastamer*, 131 La. 1), we know of no Louisiana case in which it has previously been held that a wife having no separate estate may secure a separation of community property merely because her husband is an incompetent manager or of a speculative nature. Nor in view of the Louisiana cases cited in *Bender* v. *Pfaff*, *supra*, do we believe that this Court intended in that opinion to state a broader rule. And if she can secure a separation of property, she cannot thereby recover anything with respect to community funds which he has already squandered in speculation or in riotous living.

In some of the community property states, though not in Louisiana, the husband and wife may by agreement during marriage overcome the effect of the community property law. In Louisiana the husband and wife may agree prior to marriage or in their marriage contract that the community of acquets and gains shall not exist between them, but cannot by private agreement after marriage set

He may alienate either community real estate or community personal estate without her consent, provided he does so for consideration. Article 2404; see Article 2334. The whole property and not merely one-half is subject to the payment of the community debts incurred by the husband (*Phillips* v. *Phillips*, 160 La. 813; *Marshall* v. *Mullen*, 3 Robinson 328 (S. Ct., La.); *Succession of Curtiss*, 10 La. Ann. 662; *First Nat. Bank of Abbeville* v. *Broussard*, 202 La. 315; *Succession of W. G. Kerley*, 18 La. Ann. 583; *Theus* v. *Smith* (La. App.), decided March 8, 1939 (189 So. 305), and although the court below stated that no portion of the community property could be used to pay his separate debts, the restriction means little, since the term "community debt" includes apparently any obligation incurred by the husband during marriage, including liability for his torts (*Bauer* v. *Albers*, 187 La. 496; *Edwards* v. *Ricks*, 30 La. Ann. 926; *Hawley* v. *Crescent City Bank*,

it aside. Articles 2392 and 2399 of the Louisiana Civil Code, Appendix, *infra*. Louisiana spouses do not have a general power to make contracts with each other and sales and transfers between them except in a few specified instances are void. *Kelly* v. *Kelly*, 131 La. 1024; *Guillot* v. *Guillot*, 141 La. 86, 90; *Marks* v. *Louvenberg*, 143 La. 196. Gifts are at best revocable. Louisiana Civil Code, Article 1749; *Cousin* v. *St. Tammany Bank & Trust Co.*, 146 La. 393; *Succession of Johnson*, (La. App.), decided May 11, 1942 (8 So. 2d 139); *Howard* v. *United States*, 125 F. 2d 986 (C. C. A. 5th).

In some of the other community property states, however, the spouses may contract with each other and the

26 La. Ann. 230; *Kelly* v. *Robertson*, 10 La. Ann. 303).[1] A community debt does not mean a debt incurred for the benefit of both spouses and expenditure of community funds may be made by the husband to gratify any personal desire without any liability to account to the wife. *Frierson* v. *Frierson, supra.*

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status of community or separate property may be changed by agreement. See California Civil Code (Deering, 1941), Sections 158, 159, 160. *Estate of Watkins*, 16 Cal. 2d 793, 797; *United States* v. *Goodyear*, 99 F. 2d 523, 526-527 (C. C. A. 9th); Remington's Revised Statutes of Washington (1932), Section 6894; *State ex rel. Van Moss* v. *Sailors*, 180 Wash. 269; *Seaton* v. *Smith*, 186 Wash. 447; *Snyder* v. *Snyder*, (S. Ct., Wash.) decided March 24, 1943 (135 P. 2d 455); *Estate of Baldwin*, 50 Ariz. 265; 273, and cases cited; *Greenwood* v. *Commissioner*, 134 F. 2d 915 (C. C. A. 9th). New Mexico holds otherwise even though the parties may contract with each other. *McDonald* v. *Lambert*, 43 N. M. 27, 32-36. See also III Vernier, *American Family Laws* (1935), Section 178.

[1] Article 2403 of the Louisiana Civil Code (Appendix, *infra*) provides merely that debts contracted during marriage must be acquitted out of the common fund. But the wife has no authority to contract obligations that are binding on the community property except in exceptional circumstances, whereas the husband has full power to do so. The only restriction is that creditors of the husband, after dissolution of the community, are subordinated to creditors of the community. *Thompson* v. *Vance*, 110 La. 26. And despite the prohibition of Article 2403, the community property has been held liable for the husband's antenuptial debts. *Davis* v. *Compton*, 13 La. Ann. 396. Cf. *Glenn* v. *Elam*, 3 La. Ann. 611.

McKay, *Community Property* (Second Ed.), Section 802, states that the general rule is that community property may be seized and sold on forced sale or execution to

This does not mean that the husband has unrestricted dominion over the community property. He may not give away the community real estate or a substantial part of the community personal estate and if he deliberately defrauds his wife, she has a remedy against the heirs. Article 2404, Appendix, *infra; Bender* v. *Pfaff*, *supra*. The enrichment of his separate estate at the expense of the community may also lead to a reimbursement when the community is dissolved (Article 2408, Appendix, *infra*), though reimbursement is not for the funds thus expended but for the enhancement in value of the property (*Munchow* v. *Munchow*, 136 La. 753). She, too, has certain powers to pledge the credit of the community (*Prendergast* v. *Cassidy*, 8 La. Ann. 96; *Landau* v. *Warwick*, 10 La. Ann. 30; *Gosserand* v. *Montleone*, 159 La. 316; *Wilson* v. *Henderson* (La. App.), decided June 28, 1939 (191 So. 602); *D. H. Holmes Co.* v. *Morris*, 188 La. 431), though her

satisfy a judgment against the husband, whether or not the debt is a community debt. He excepts only the State of Washington, where he states that community debts only may be satisfied out of community property. Although Washington has no statutory provision dealing generally with the question, the rule is as McKay has stated. *Poe* v. *Seaborn*, 282 U. S. 101; *Schramm* v. *Steele*, 97 Wash. 309. But this does not mean all that the rule implies, for the reason that a very liberal view is taken of what constitutes a community debt. See *Henning* v. *Anderson*, 121 Wash. 53; *Kuhn* v. *Groll*, 118 Wash. 285; *In re Levinson*, 1 F. 2d 851 (C. C. A. 9th), certiorari denied, *sub nom. Greene* v. *Booth*, 267 U. S. 598.

power is limited (*Luthy* v. *Philip Werlein Co.*, 163 La. 752). See Leon D. Hubert, Jr., *Effect of Recent Acts on the Incapacities and Disabilities of Married Women in Louisiana*, 8 Tulane Law Review 106. She may also, in certain circumstances, bind the community property by her torts. *Adams* v. *Golson*, 187 La. 363; *Matulich* v. *Crockett* (La. App.), decided November 28, 1938 (184 So. 748). But notwithstanding these restraints on the husband, it is clear that the wife's interest in the community property, during her husband's lifetime, does not embrace, with respect to her half interest, anything close to an exclusive right to enjoy, manage, and dispose of the property; the death of the husband gives to her significant attributes of ownership—the right to sole management, control, enjoyment, and dispositive power.

The test applied. Under *Tyler* v. *United States*, *supra*, and *United States* v. *Jacobs*, *supra*, the congressional power to include in the tax base all property owned in common by the decedent and another depends on whether his or her death results in acquisition by the other of substantial rights of property not previously enjoyed; and the fact that the other previously had a "vested interest" is immaterial. The changes in the rights of Louisiana spouses as to community property which are brought about by the death of the husband, and the substantial attributes of

ownership which for the first time accrue to the surviving wife, are clearly as great as, or greater than, the alterations brought about by the death of the co-owner in these cases. Whatever may be the rights of the wife to secure a separation of property during her husband's lifetime, under the Louisiana decisions, it is plain that they are not so absolute as was the power of the joint tenant in the *Jacobs* case to destroy the tenancy by making a conveyance. Nor may the *Tyler* and *Jacobs* cases be discounted because one of the incidents of the death of one joint tenant or a tenant by the entirety is to give the survivor a power of testamentary disposition not previously enjoyed, whereas the death of the husband in Louisiana does not alter the wife's testamentary power over half of the community property. While succession to the testamentary power was one of the incidents relied on in those opinions, the basis of the decisions is not limited to that circumstance. That was only one of the several rights in the bundle that shifted on the decedent's death. A compensating factor here, with respect to community property, is the succession of the wife to management and control of the community property for the first time on the husband's death and to a right to appropriate its fruits.

The principle, moreover, that the shifting of economic interests at death may furnish a proper occasion for the imposition of an estate tax, is

not limited to cases dealing with property interests created by private conveyance. *Moffitt* v. *Kelly*, 218 U. S. 400, held that a state was not precluded from imposing a succession tax measured by the entire community estate, even though the wife had a vested right in the property which could not be impaired by subsequent legislation.[*] Other federal courts have held that there is no constitutional objection to the inclusion in the husband's gross estate of the value of the wife's statutory interest given in lieu of dower, even though under state law the interest is regarded as being vested in her by virtue of the marriage and the statute, and as not passing to her by descent. *Allen* v. *Henggeler*, 32 F. 2d 69 (C. C. A. 8th), certiorari denied, 280 U. S. 594; *Nyberg, Administratrix* v. *United States*, 66 C. Cls. 153, certiorari denied, 278 U. S. 646. It is to be noted that the Supreme Court of Nebraska has approved the holding in the *Henggeler* case. *In re Estate of Sides*, 119 Neb. 314, 323. To the same effect is *Brock* v. *Commissioner*, 16 B. T. A. 1358.

Finally, the court below sought to distinguish the *Tyler* and *Jacobs* cases on the ground that there the wife contributed nothing either in money

[*] The fact that it was subsequently held that the California wife's interest in community property in 1906 was not a vested interest (*United States* v. *Robbins*, 269 U. S. 315) in no way impairs the authority of the decision in *Moffitt* v. *Kelly*, *supra*, for that case was decided on the assumption that her interest was vested.

or property to the joint tenancy or tenancy by the entirety, whereas in Louisiana "the civil law prevails, and the theory of the civil law is that the acquisition of all property during the marriage is due to the joint or common efforts, labor, industry, economy, and sacrifices of the husband and wife" (R. 27). But plainly Congress is no more bound by the "amiable fiction" of the civil law that a Louisiana wife earns half of her husband's salary then it was by the amiable fiction of the common law, in dealing with tenancies by the entirety, that husband and wife are one person. See *Tyler* v. *United States*, *supra*. Economically the salary is attributable to the personal efforts of the husband, not of the wife. Similarly, the income from the separate property of the husband is economically attributable to him rather than to his wife, despite the fact that the state law chooses to regard that income as something both have earned. The fictional basis of the Louisiana law, in this respect, is underscored by the fact that whenever there is a divorce, for whatever cause, the wife takes half of the residue of the community property. She may not have performed any of her marital duties, but the reward is the same.

Equally important, the result reached in the *Tyler* and *Jacobs* cases was probably not dependent for its constitutional validity upon the proposition that the surviving spouse had contributed nothing to the co-owned property and that the

decedent had furnished everything. The emphasis in these cases is not upon the origin of the tenancy by the entirety or the joint tenancy but upon the rights respecting it once established. Thus, it was held that the full value of the property passing to a survivor under a tenancy by the entirety created prior to the estate tax act of 1916 could be included within the decedent's gross estate. *Third Nat. Bank & Trust Co.* v. *White*, 287 U. S. 577; *Helvering* v. *Bowers*, 303 U. S. 618. The *Jacobs* case itself dealt with a joint tenancy created prior to 1916. And in *Dimock* v. *Corwin* (decided with the *Jacobs* case), which also involved a joint tenancy created prior to 1916, a part of the joint property was contributed from the separate property of the surviving wife. The latter property had been given to her by the husband prior to the creation of the joint tenancy, but was hers to do with as she pleased. The full value of the joint tenancy was nevertheless taxed to the husband's estate, the wife's contribution apparently being considered for its bearing on the construction of the statute rather than on any question of constitutional authority (306 U. S. at pp. 372–373). See *Whitney* v. *Tax Commission*, 309 U. S. 530, 539.

The federal statute requires, as a minimum, that there shall be included within a decedent's gross estate such part of the community property as was subject to his or her power of testamentary

disposition. This provision serves to include one-half of the community property here involved within the decedent's gross estate,[7] and appellees raise no objection on this score. The remaining provision of the federal statute requires that the full value of community property be included within the estate of the spouse first to die, except to the extent that the community property is attributable to the earnings of the surviving spouse or to income from his or her separate property. In this, as presumably in most cases, all of the

[7] In most but not all of the community property states each spouse has the right to dispose of one-half of the community property by will. Nevada has made several changes in its laws dealing with this question. By Section 10 of the Act of March 10, 1873 (Statutes of Nevada (1873), p. 193), it was provided that if the wife died first, the community property belonged to the surviving spouse but if the husband died first, the wife should take one-half and the other half was subject to testamentary disposition of the husband. By the Act of March 27, 1935 (Statutes of Nevada (1935), c. 110, p. 232), it was provided that upon the death of either spouse, the entire community property belonged to the survivor, except that if the husband should have abandoned his wife, one-half would be subject to her testamentary disposition. By the Act of March 26, 1937 (Statutes of Nevada (1937), c. 197, p. 417), the provisions of the Act of March 27, 1935, were repealed. Under the 1937 act the husband was to have the power of testamentary disposition over one-half but the wife was not unless she had been abandoned by her husband. See Sections 3361, 3365, New Compiled Laws of Nevada (1929). In New Mexico also, it appears that the husband, but not the wife, has power of testamentary disposition with respect to community property. New Mexico Statutes (1941) Annotated, Sections 31-108, 31-109. See also *Hernandez v. Becker*, 54 F. 2d 542 (C. C. A. 10th).

community property is attributable to the earnings of the husband. Hence, this provision requires inclusion of the second half of the community property within the decedent's gross estate. It is the inclusion of this second half to which appellees object. Since, as we have seen, the husband's death ripened for the surviving wife substantial property rights which had not previously existed, there is no tenable objection to the inclusion of this portion of the community property under the Fifth Amendment.

Inasmuch as the present case brings into play every provision of the statute and, as applied to the facts here, the statute does not offend the Fifth Amendment, there would seem to be no occasion to discuss its application to other situations not presented by this record. One may complain only of violation of his own constitutional rights, not of those of another. *Heald* v. *District of Columbia*, 259 U. S. 114, 123; *Virginian Ry.* v. *Federation*, 300 U. S. 515, 558.

In any event, however, the death of *either* spouse effects a shift to the other of substantial rights respecting the community property. On the wife's prior death the husband is freed of the fetters deemed substantial in *Bender* v. *Pfaff*, *supra*, although where even half of the property is traceable to the husband's income the share taken by him will not be included in his wife's gross estate. In cases such as the present, only the one-half of the community property will be taxable to the

wife's estate, upon her death, prior to the husband, over which she has the right of testamentary disposition. The inclusion of such half, even where the total property is economically attributable to the survivor, is justified under the cases holding that property passing under the exercise of a power of appointment by will may be included in the donee's estate. *Whitney* v. *Tax Commission*, 309 U. S. 530. See also *Morgan* v. *Commissioner*, 309 U. S. 78, 626; Einstein, *Powers of Appointment and Estate Taxes, II*, 52 Yale L. J. 494, 551 (1943).[20] Prior to the enactment of Section 402 (b) of the Revenue Act of 1942, one-half of the value of the community property was includible in the gross estate of the decedent-wife. Where, as here, the husband's separate property and earnings produce the community property and the wife predeceases him, no substantial change is effected by the 1942 Act.

The uniformity requirement.—There remains only the possible contention that Section 402 (b)

[20] That the wife's power of testamentary disposition over half the community property, possessed by her in all the community property states save New Mexico and Nevada (see Vetnier, *supra*), is a sufficient basis, at least coupled with her other interests, to assess against her estate a tax on the basis of that half of the community property, is also made clear by the decisions that held under the prior law that the husband's estate was taxable on only half the community property. *United States* v. *Goodyear*, 99 F. 2d 523 (C. C. A. 9th); *De Lappe* v. *Commissioner*, 113 F. 2d 48 (C. C. A. 5th). See *Lang* v. *United States*, 304 U. S. 264. See also *New York Trust Co.* v. *Eisner*, 256 U. S. 345.

offends the uniformity requirement of the first paragraph of Article I, Section 8, of the Constitution. The state District Court (R. 13), though not the court below, held the taxing statute invalid under that provision of the Constitution.

There is no merit to this contention. It is well settled that geographic uniformity is all that is required under Article I, Section 8. A tax is uniform when it operates with the same force and effect in every place where the taxable subject is found. *Head Money Cases* (*Edye* v. *Robertson* and *Cunard Steamship Co.* v. *Robertson*), 112 U. S. 580; *Knowlton* v. *Moore*, 178 U. S. 41; *Poe* v. *Seaborn*, 282 U. S. 101; *Crooks* v. *Harrelson*, 282 U. S. 55. The class of taxes known as duties, imposts and excises, to which the rule of uniformity applies, is by nature the least susceptible to the requirement of *inherent* equality and uniformity (*Knowlton* v. *Moore*, *supra*), and no such requirement has been exacted (*Knowlton* v. *Moore*, *supra*; *Billings* v. *United States*, 232 U. S. 261, 282; *Florida* v. *Mellon*, 273 U. S. 12; *Bromley* v. *McCaughn*, 280 U. S. 124, 138–139; *Poe* v. *Seaborn*, *supra*, p. 117; *Crooks* v. *Harrelson*, *supra*). In *Poe* v. *Seaborn*, *supra*, where it was argued that to permit income earned in community property states to be divided between the spouses for federal tax purposes would violate the uniformity requirement, the Court said (pp. 117–118):

> * * * differences of state law, which may bring a person within or without the

> category designated by Congress as taxable, may not be read into the Revenue Act to spell out a lack of uniformity.

Section 402 (b) obviously lays down a uniform federal estate tax rule with respect to community interests wherever they are found. Congress is not prohibited from imposing such a tax by reason of the fact that all of the states do not have such a system or by reason of any supposed advantages that will accrue to citizens of common law jurisdictions to which the statute does not apply. *Poe v. Seaborn, supra.*

Any contention that the common law states will have a tax advantage is somewhat incongruous in view of the fact that the Congressional purpose was to eliminate the tax advantages enjoyed by the community property states. S. Rep. No. 1631, 77th Cong., 2d Sess., p. 231. But if such advantages will accrue, the community property states have it within their power to eliminate them by the amendment of their own statutes. In fact,

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It may be noted that where the wife dies first spouses in community property states still retain substantial estate tax advantage over spouses in common law jurisdictions. For in this situation, as the typical case, the wife's estate will be taxed with respect to one-half of the value of the property acquired during the marriage, leaving the husband's estate to be taxed only with the remaining one-half. In common law states, on the other hand, the entire tax will be borne by the husband's estate and, due to the graduated rates, that tax will be greater than it would have been had the aggregate estate been divided and taxed as two units.

even if they would be required to amend their constitutions to secure for their citizens equality with the citizens of other states in the matter of federal estate taxation, the federal statute would nevertheless satisfy the uniformity clause. *Florida v. Mellon*, 273 U. S. 12.[22]

CONCLUSION

This Court should not accept jurisdiction of this case for the purpose of deciding whether or not

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[22] Some of the community property states originally had the common law system. In Arizona, Chapter XXVII of the Arizona Code (Howell's) adopted by the first territorial legislature on November 10, 1864, contained 32 sections relating to dower. The law of community property was not adopted until 1865, by an act of the second territorial legislature, dated December 3, 1865, Section 10 of which expressly provided that there should no longer be any estate of dower and courtesy allowed. This statute embodied almost verbatim the provisions of the original California community property law of 1850. In Idaho, the first territorial legislature, by a sweeping act, approved June 4, 1864, adopted the common law of England "as the law of the land in the territory," so far as the same was not inconsistent with the provisions of the Constitution and laws of the United States, the organic law of the territory, and the laws of the territory. The community property law, also taken almost verbatim from the original California statute, was first adopted at the fourth session of the territorial legislature by an act approved January 9, 1867. In Nevada, too, the very first act of territorial legislature at its first session was to provide that the common law of England, so far as it was not repugnant to, or inconsistent with the Constitution or laws of the United States or the law of the territory, should be the rule of decision in all courts of the territory. This was in effect, so far as concerns property rights, until the first commu-

Section 402 (b) of the Revenue Act of 1942 is constitutional. In any event, the provision is valid.

Respectfully submitted.

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nity property law was enacted (Stat. 1864–1865, p. 239). *Darrenberger* v. *Haupt*, 10 Nev. 43; *Lake* v. *Bender*, 18 Nev. 361, 382. In Washington, the common law right of dower and courtesy existed from 1855 to 1869. The right of dower is repeatedly referred to in the laws up to that time and was elaborately provided for at the 1864 session of the territorial legislature by an act, which, like the Arizona statute of 1864, covered 32 sections and was passed on June 30, 1864. A community property act, also in substantially identical language as the original California act, was first adopted by an act approved December 2, 1869. This was displaced by an act approved November 29, 1871. The latter act was in turn displaced by the act of November 14, 1879, which, with amendments, is in effect today.

APPENDIX

Constitution of the United States:

ARTICLE 1, SECTION 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

* * * * *

FIFTH AMENDMENT.—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intan-

gible, wherever situated, except real property situated outside of the United States—

* * * * *

(e) *Joint Interests.*—To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: *Provided*, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further*, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants.

* * * * *

(26 U. S. C., Sec. 811.)

Revenue Act of 1942, c. 619, 56 Stat. 798:

SEC. 402. COMMUNITY INTERESTS.

* * * * *

(b) *General Rule.*—Section 811 (e) (relating to joint interests) is amended as follows:

(1) By striking out "(e) *Joint Interests.*—" and inserting in lieu thereof

"(e) *Joint and Community Interests.*—

"(1) *Joint Interests.*—".

(2) By inserting at the end thereof the following new paragraph:

"(2) *Community Interests.*—To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition.

* * * * *

(26 U. S. C., Supp. II, Sec. 811.)

Louisiana Civil Code (Dart, 1932):

ART. 915. *Community property—Inheritance and distribution.*—When either husband or wife shall die, leaving neither a father nor mother nor descendants, and without having disposed by last will and testament of his or her share of the com-

munity property, such undisposed of share shall be inherited by the surviving spouse in full ownership. In the event the deceased leave descendants, his or her share in the community estate shall be inherited by such descendants in the manner provided by law. Should the deceased leave no descendants, but a father and mother, or either, then the share of the deceased in the community estate shall be divided in two equal portions, one of which shall go to the father and mother or the survivor of them, and the other portion shall go to the surviving spouse. [As amended, Acts 1910, No. 57; 1916, No. 80; 1920, No. 160.]

ART. 2332. *Community of acquets or gains—Modification or abrogation by agreement.*—The partnership, or community of acquets or gains, needs not be stipulated; it exists by operation of law, in all cases where there is no stipulation to the contrary.

But the parties may modify or limit it; they may even agree that it shall not exist.

ART. 2334. *Separate and common property of spouses.*—The property of married persons is divided into separate and common property.

Separate property is that which either party brings into the marriage, or acquires during the marriage with separate funds, or by inheritance, or by donation made to him or her particularly.

The earnings of the wife when living separate and apart from her husband although not separated by judgment of court, her earnings when carrying on a business, trade, occupation or industry separate from her husband, actions for damages resulting from offenses and quasi offenses and the

property purchased with all funds thus derived, are her separate property.

Actions for damages resulting from offenses and quasi offenses suffered by the husband, living separate and apart from his wife, by reason of fault on her part, sufficient for separation or divorce shall be his separate property.

Common property is that which is acquired by the husband and wife during marriage, in any manner different from that above declared. But when the title to community property stands in the name of the wife, it can not be mortgaged or sold by the husband without her written authority or consent. [As amended, Acts 1912, No. 170; 1920, No. 186.]

ART. 2335. *Separate property of wife—Dotal and paraphernal property.*—The separate property of the wife is divided into dotal and extradotal.

Dotal property is that which the wife brings to the husband to assist him in bearing the expenses of the marriage establishment.

Extradotal property, otherwise called paraphernal property, is that which forms no part of the dowry.

ART. 2336. *Spouses — Donations inter se—Right to receive donations.*—Husband and wife may, by their marriage contract, make reciprocally or one to the other, or receive from other persons, in consideration of their marriage, all kinds of donations, according to the rules and under the modifications prescribed in the title: OF DONATIONS INTER VIVOS AND MORTIS CAUSA.

ART. 2337. *Dowry—Meaning of term.*—By Dowry is meant the effects which the

wife brings to the husband to support the expenses of marriage.

* * * * *

ART. 2383. *Definition.*—All property which is not declared to be brought in marriage by the wife, or to be given to her in consideration of the marriage or to belong to her at the time of the marriage, is paraphernal.

ART. 2384. *Wife's right to administer.*—The wife has the right to administer personally her paraphernal property, without the assistance of her husband.

ART. 2385. *Wife failing to administer paraphernal property—Management by husband.*—The paraphernal property, which is not administered by the wife separately and alone, is considered to be under the management of the husband.

ART. 2386. *Fruits of paraphernal property—Ownership.*—When the paraphernal property is administered by the husband, or by him and the wife indifferently, the fruits of this property, whether natural, civil, or the result of labor, belong to the conjugal partnership, if there exists a community of gains. If there do not, each party enjoys, as he chooses, that which comes to his hands; but the fruits and revenues, which are existing at the dissolution of the marriage, belong to the owner of the things which produce them. [As amended, Acts 1871, No. 87.]

ART. 2387. *Wife—Assumption of administration of paraphernal property.*—The wife who has left to her husband the administration of her paraphernal property, may afterwards withdraw it from him.

* * * * *

ART. 2392. *Stipulation against marital partnership.*—Married persons may stipulate that there shall be no partnership between them.

ART. 2399. *Community of acquets and gains—Stipulation against required.*—Every marriage contracted in this State, superinduces of right partnership or community of acquets or gains, if there be no stipulation to the contrary.

* * * * *

ART. 2402. *Property forming community—Personal injuries to wife.*—This partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estate which they may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two and not of both, because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase. But damages resulting from personal injuries to the wife shall not form part of this community, but shall always be and remain the separate property of the wife and recoverable by herself alone; "provided where the injuries sustained by the wife result in her death, the right to recover damages shall be as now provided for by existing laws." [As amended, Acts 1902, No. 68.]

ART. 2403. *Community and individual debts.*—In the same manner, the debts con-

tracted during the marriage enter into the partnership or community of gains, and must be acquitted out of the common fund, whilst the debts of both husband and wife, anterior to the marriage, must be acquitted out of their own personal and individual effects.

ART. 2404. *Husband master of community—Gratuitous and fraudulent conveyances.*—The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.

He can make no conveyance inter vivos, by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the children of the marriage. A gratuitous title within the contemplation of this article embraces all titles wherein there is no direct, material advantage to the donor.

Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons.

But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one-half of the property, on her satisfactory proving the fraud. [As amended, Acts 1926, No. 96.]

* * * * * *

ART. 2406. *Dissolution of marriage—Division of community.*—The effects which compose the partnership or community of gains, are divided into two equal portions

between the husband and the wife, or between their heirs, at the dissolution of the marriage; and it is the same with respect to the profits arising from the effects which both husband and wife brought reciprocally in marriage, and which have been administered by the husband, or by husband and wife conjointly, although what has been thus brought in marriage, by either the husband or the wife, be more considerable than what has been brought by the other, or even although one of the two did not bring anything at all.

* * * * * *

ART. 2408. *Increase or improvement of separate property during marriage—Division—Unearned increment—Separate property improved at expense of community.*—When the separate property of either the husband or the wife has been increased or improved during the marriage, the other spouse, or his or her heirs, shall be entitled to the reward of one-half of the value of the increase or ameliorations, if it be proved that the increase or ameliorations be the result of the common labor, expenses or industry; but there shall be no reward due, if it be proved that the increase is due only to the ordinary course of things, to the rise in the value of property, or to the chances of trade.

ART. 2409. *Debts contracted during marriage—Liability.*—It is understood that, in the partition of the effects of the partnership or community of gains, both husband and wife are to be equally liable for their share of the debts contracted during the marriage, and not acquitted at the time of its dissolution.

ART. 2410. *Wife or her heirs or assigns—Renunciation of community—Exoneration from debts.*—Both the wife and her heirs or assigns have the privilege of being able to exonerate themselves from the debts contracted during the marriage, by renouncing the partnership or community of gains.

ART. 2411. *Wife renouncing community—Effect.*—The wife, who renounces, loses every sort of right to the effects of the partnership or community of gains.

But she takes back all her effects, whether dotal or extradotal.

ART. 2412. *Wife—Active concern in community — Renunciation prohibited.*—The wife who has taken an active concern in the effects of the community, can not renounce the same.

Acts which are simply administrative or conservatory, do not come, in this article, under the denomination of active concern.

ART. 2413. *Wife—Preservation of power to renounce — Inventory.*—The surviving wife, who wishes to preserve the power of renouncing the community of gains, must make an inventory within the delays and with the formalities prescribed for the beneficiary heir.

* * * * *

ART. 2425. *Wife's right to petition for separation of property.*—The wife may, during the marriage, petition against the husband for a separation of property, whenever her dowry is in danger, owing to the mismanagement of her husband, or otherwise, or when the disorder of his affairs induces her to believe that his estate may not be sufficient to meet her rights and claims.

* * * * *

ART. 2427. *Judicial decree essential.*—The wife must petition for the separation of property, and it can only be ordered by a court of justice, after hearing all parties. It can, in no case, be referred to arbitration.

Every voluntary separation of property is null, both as respects third persons and the husband and wife between themselves.

Louisiana Code of Practice (Dart):

ART. 996.65. *Schedule of taxes—Taxable property.*—Upon every inheritance, legacy, or donation or gift made in contemplation of death, to or in favor of a direct descendant, by blood or affinity, ascendant or surviving spouse of decedent, the amount or value of which shall exceed five thousand dollars ($5,000) the tax shall be two (2) percent of the actual value thereof at the time of death on the amount in excess of five thousand dollars ($5,000) up to twenty thousand dollars ($20,000), and three (3) percent of such actual value on the amount in excess of twenty thousand dollars ($20,000).

Upon every inheritance, legacy, or donation or gift made in contemplation of death, to a collateral relation (including brothers or sisters by affinity), the amount or value of which shall exceed one thousand dollars, the tax shall be five (5) percent of the actual value thereof at the time of death, on the amount in excess of one thousand dollars ($1,000) up to twenty thousand dollars ($20,000); and seven (7) percent of such actual value on the amount in excess of twenty thousand dollars ($20,000).

Upon every legacy, or donation or gift made in contemplation of death, to a stranger, the amount or value of which

shall exceed five hundred dollars ($500) the tax shall be five (5) percent of the actual value thereof at the time of death, on the amount in excess of five hundred dollars ($500) up to five thousand dollars ($5,000) and ten (10) percent on the amount in excess of five thousand dollars ($5,000).

Said tax shall be imposed with respect to all property of every nature and kind included or embraced in any inheritance, legacy, or donation or gift made in contemplation of death, including all personal property physically in the state of Louisiana, whether owned or inherited by, or bequeathed, given or donated to, a resident or nonresident, and whether inherited, bequeathed, given or donated to, under the law of this state or of any other state or country; and all personal property owned by residents of the state of Louisiana, wherever situated, unless such property shall be included in the exemptions above set forth.

In the event that any real estate is included in the estate of the decedent and is bona fide mortgaged in an amount in excess of 50 per cent of its value, in computing the equity of value of such estate for the purposes of assessing an inheritance tax, the apparent margin between the appraised value of such realty and the mortgage encumbrance thereon shall be reduced by an amount equal to 20 percent of such encumbrance [Acts 1921 (E. S.), No. 127, § 2].

ART. 996.66. *Manner of taking possession of succession.*—It shall be unlawful for any heir, legatee, or other beneficiary of a donation mortis causa to take or be in possession of any part of the things or property composing the inheritance, legacy, or other

donation mortis causa, or to dispose of the same or any part thereof, until he shall have obtained the authority of the court to that effect, except as hereafter provided in section 17 [Art. 996.80]; and in case he shall so take or be in possession or shall so dispose of such things or property, or any part thereof, he shall no longer have the right of renouncing such inheritance or donation mortis causa, and shall remain personally liable for the tax thereon; but he may, without waiting for authority do such acts as may seem necessary to preserve the property from waste, damage, or loss [Acts 1921 (E. S.), No. 127, § 3].

ART. 996.67. *Duty of executor.*—The executor of the will of a person deceased, or the administrator of his succession, shall, except as hereafter provided in section 17 [Art. 996.80], after payment of his debts, proceed against the tax collector and all the heirs and legatees of the deceased summarily, by rule before the court which has jurisdiction of the succession, to fix the amount of tax due by each heir or legatee, and on trial thereof the court shall render judgment for the same against each heir or legatee, with interest and costs, as hereinafter provided [Acts 1921 (E. S.), No. 127, § 4].

ART. 996.68. *Amount of taxes to be deducted by executor or administrator.*—The executor or administrator shall thereupon pay to the tax collector the amount of tax, with interest and costs, so fixed, on each inheritance, legacy or donation, out of the funds comprised therein, if sufficient. Should there not be sufficient funds, the court shall, on the application of the heir or legatee, grant an order for the sale of the

property composing such inheritance, legacy or donation, or so much thereof as may be necessary, for the purpose of paying such judgment. If the same be not paid by the heir or legatee, or an order of sale be not granted, as above provided within thirty days after the date of the judgment, the court shall, on the application of the executor or administrator, grant an order of sale for the said purpose, as above provided, and the executor or administrator shall pay the said judgment out of the proceeds of the sale.

Such sale shall be made in such manner, and on such terms and conditions as the court shall prescribe, and the expense thereof shall be borne by the heir or legatee [Acts 1921 (E. S.), No. 127, § 5].

ART. 996.69. *Delivery of inheritance prohibited until tax paid—Liability of executor or administrator.*—No executor or administrator shall deliver any inheritance, or legacy until the tax thereon shall be fixed and paid, as herein provided; otherwise he, together with his surety, shall be personally liable for said tax, with interest and cost. And no executor or administrator shall be discharged until it is shown that all taxes under this act, due by the heirs and legatees, have been paid, or until it is judicially determined by the process herein provided that no tax is due [Acts 1921 (E. S.), No. 127, § 6].

ART. 996.70. *Administration not ordered by court—Duty of heir or universal legatee—Legatees and donees—Fixing and collection of tax.*—In all cases in which an administration is not ordered by the court, the legal instituted heir, or universal or residuary legatee, or any other interested

person, except as provided in section 17 [Art. 996.80], shall within six months after the death of the decedent, or should there be a will, within the same time after the discovery of the same, present to the court a detailed descriptive list, sworn to and subscribed by him, of all items of property contained in and composing the estate of the decedent, and therein shall state the actual cash value of each such item at the time of the death of the decedent, and service thereof shall be made on the tax collector who shall have the right to traverse the same. Should the deceased have made special or particular legacies or donations mortis causa, the legatee shall also be served, and after summarily hearing the parties the court shall fix the amount of tax due as aforesaid by each such heir or legatee, and shall render judgment therefore with interest and costs, against each of them. The various clerks and deputy clerks of the district courts of the state of Louisiana, whether the district judges be present or absent from the parish, are hereby authorized to sign rules against legatees and against the sheriffs and ex officio tax collectors of the various parishes, directing the said sheriffs and ex officio tax collectors to show cause at such time, but not less than five days, as may be fixed in said rule, why the inheritance tax, if any, should not be fixed by the court as prayed for, and why heirs and other beneficiaries should not be sent into possession of property, acquired by inheritance or donations mortis causa, upon the payment of the inheritance tax as fixed, or without the payment of inheritance taxes, where none is due, as the case may be. In cases where such rules are not contested, the various district judges are hereby au-

thorized to pass upon such rules and sign judgments thereon in open court or in chambers, in term time or in vacation, and either within or without their districts [Acts 1921 (E. S.), No. 127, § 7; 1922, No. 44, § 1].

ART. 996.71. *Payment of tax by heir or universal legatee.*—In the same manner as provided in section 5 [Art. 996.68], the heir or universal or residuary legatee shall thereupon pay or take measures for the payment of the tax due on all special or particular legacies or donations [Acts 1921 (E. S.), No. 127, § 8].

ART. 996.72. *Property may be sold to pay taxes.*—The heir or universal residuary legatee may likewise obtain an order for the sale of the property of his inheritance or legacy, or part thereof, for the purpose of paying the tax thereon. But if such tax be not paid, or such order of sale be not made within thirty days after the date of the judgment fixing the amount of the tax a similar order for the same purpose shall be granted on the application of the tax collector, and thereunder any property forming part of the inheritance or legacy may be sold, and the proceeds thereof shall be applied to the payment of the tax with interest and costs [Acts 1921 (E. S.), No. 127, § 9].

ART. 996.73. *Duty of heir to see that tax is paid.*—The heir or residuary or universal legatee shall not deliver any legacy until the tax thereon shall have been fixed and paid; otherwise he shall be personally liable for the said tax, with interest and costs [Acts 1921 (E. S.), No. 127, § 10].

ART. 996.74. *Succession remaining unopened—Duty of court—Search for will.*—If during the six months next following the

death of any person leaving property, movable or immovable, within this state, an administration of his succession be not applied for, or his legal or instituted heir or universal or residuary legatee do not apply to the court to be placed in possession thereof, as herein provided, the court shall ex parte and on the application of the tax collector grant an order directing that a search be made for the will of the deceased by a notary public, and in aid of the same order that all persons having in their possession or control any books, papers or documents of the deceased or any bank-box, safe deposit vault or other receptacle likely or designed to contain the same, shall open such receptacle and exhibit the contents thereof, as well as all other books, papers, and documents of the deceased, to the said notary [Acts 1921 (E. S.), No. 127, § 11].

ART. 996.75. *Will found—Appointment of executor by court.*—Should the said notary find any document appearing to be the will of the deceased, he shall take possession of the same and produce it in court; and on application of the tax collector, or of any party in interest, the court shall proceed to the probate thereof, as now provided by law. If an executor be therein appointed, the person named shall be notified, and if he do not within ten days after notification accept the appointment, and if within the ten days next following this delay no person entitled to be appointed dative testamentary executor shall apply for the appointment, then the public administrator in the parish of Orleans, and in the other parishes the tax collector, shall be appointed dative testamentary executor of the said decedent, and the administration of his succession shall proceed as herein directed and accord-

ing to existing law [Acts 1921 (E. S.), No. 127, § 12].

* * * * *

ART. 996.78. *Right of creditors preserved.*—Nothing contained in this act shall affect the rights of creditors of persons deceased or the rights of the creditors of the heirs or legatees of such persons, as established by the general law [Acts 1921 (E. S.), No. 127, § 15].

ART. 996.79. *Legacy indivisible—Liability of property for tax.*—Each inheritance or legacy is indivisible, and must be accepted or renounced for the whole; and the heir or legatee shall not be entitled to be placed in possession of the same, and shall be without right or capacity to alienate any part thereof, until the tax on the whole shall have been fixed and paid, or until it shall have been judicially determined, in the manner herein provided, that no part of the same is subject to the tax imposed by this act; provided, that where the heir or legatee has made a transfer of the property inherited by or bequeathed to him, the transferee, or any one holding under him, may pay the tax herein levied to the officer authorized to receive the same, together with such interest and penalties as may be due thereon at the time of payment, and upon such payment his title to the property shall become, in all respects, as valid as if the said tax had been paid by the said heir or legatee, and all amounts so paid, together with attorney's fees of ten percent thereon, may be recovered from the person originally liable therefor, in any court of competent jurisdiction [Acts 1921 (E. S.), No. 127, § 16].

* * * * *

ART. 996.82. *Jurisdiction of proceedings.*—The district court of the last domicil of the deceased, and in the parish of Orleans the civil district court, shall have original jurisdiction to hear and determine all the proceedings provided by this act. In the case of a nonresident decedent, the district court, or civil district court, of any parish in which he left property, movable or immovable, shall exercise such jurisdiction, and the court in which such proceedings shall be first begun shall have exclusive original jurisdiction thereof [Acts 1921 (E. S.), No. 127, § 19].

* * * * *

ART. 996.87. *Interest on unpaid taxes.*—Taxes hereby levied shall bear interest at the rate of one per cent per month, beginning six months after the death of the decedent, and two per cent per month, beginning twelve months after the death of decedent, saving to any heir, legatee, or donee the right to stop the running of interest against him by paying the amount of his tax with accrued interest, estimated or ascertained, or by tendering the same to the tax collector in the manner prescribed by the general law; provided, however, that in cases in which the settlement of the succession is bona fide contested, such interest shall be remitted; so also when it shall be shown to the satisfaction of the tax collector that the beneficiary was ignorant of the inheritance [Acts 1921 (E. S.), No. 127, § 24].

ART. 996.88. *Costs—Liability of succession—Application of act.*—The costs of all the proceedings under this act shall be borne by the mass of the succession; provided, that in cases in which it seems to

him equitable to do so the judge shall have the power to apportion the costs among the several parties, or allow any party to retain his costs out of any sum found to be due by him for tax thereunder. The provisions of this act shall apply to all successions opened by death subsequent to the date the act shall become effective; and successions opened prior thereto shall be subject to taxation under the laws in force at the time they were opened, except as otherwise provided in section 18 (Art. 996.81) of this act. [Acts 1921 (E. S.), No. 127, § 25].

ART. 996.89. *Transfer tax on estates subject to federal tax.*—There is hereby levied, in addition to the inheritance tax as now provided by Act 127 of 1921, as amended by Act 44 of 1922, an estate transfer tax upon all estates which are subject to taxation under the Federal Revenue Act of 1926 [Acts 1932, No. 119, § 1].

ART. 996.90. *State to receive tax in certain cases.*—Whenever the aggregate amount of all inheritance, succession, legacy and estate taxes actually paid to the several states of the United States in respect to any property owned by such decedent shall be less than eighty per cent (80%) of the estate tax payable to the United States under the provisions of the said Federal Revenue Act of 1926, but not otherwise, the difference between said amount and said eighty per cent (80%) shall be paid to the state of Louisiana [Acts 1932, No. 119, § 2].

ART. 996.91. *Regulation and collection of taxes.*—The provisions of Act 127 of 1921 as amended by Act 44 of 1922, in so far as

applicable shall regulate the proceedings to fix the amount of the tax hereby levied and the manner in which same shall be collected [Acts 1932, No. 119, § 3].

ART. 996.92. *Intent and purpose of act.*—It is hereby declared to be the intent and purpose of this act to obtain for this state the benefit of the credit allowed under the provisions of Title III, section three hundred and one, subsection (b), of the Federal Revenue Act of nineteen hundred twenty-six to the extent that this state may be entitled by the provisions of said act, by imposing additional taxes, and the same shall be liberally construed to effect this purpose [Acts 1932, No. 119, § 4].

ART. 996.93. *Estates to which this act applies.*—The provisions of this act shall apply to all estates not fully distributed and now in process of settlement, where the date of death was subsequent to February twenty-six, nineteen hundred twenty-six; provided there is at the time this act goes into effect a sufficient amount still due the United States Government under said Federal Revenue Act of 1926 from which to make the deduction contemplated by section 3 [Art. 996.91] hereof [Acts 1932, No. 119, § 5].

ART. 996.94. *Constitutionality, provisions severable.*—If any section or portion of this act be finally held to be unconstitutional by a court of competent jurisdiction such decision shall not invalidate the portions unaffected thereby [Acts 1932, No. 119, § 6].

ART. 996.95. *Prescription on recovery of tax.*—All actions for the recovery of inheritance taxes due the state shall prescribe by the lapse of three years, against purchasers, and other third persons in good faith, and

by the lapse of five years against the heirs of any deceased persons, starting from the date of the opening of the succession of said deceased person in one of the courts of this state [Acts 1924, No. 82, § 1].

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 252

J. HOWELL FLOURNOY, SHERIFF AND EX-OFFICIO TAX COLLECTOR,

Appellant,

versus

SAMUEL G. WIENER, WILLIAM B. WIENER AND JACQUES L. WIENER,

Appellees.

PETITION FOR REHEARING

EUGENE STANLEY,
Attorney General;
HARRY V. BOOTH,
LEONARD L. LOCKARD,
Counsel for Appellant.

OOTH & LOCKARD,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

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Appellees.

PETITION FOR REHEARING

May it please the Court;

The Court has erred herein:

(1) In failing to recognize that the basic and all deciding issue was the unconstitutionality of the Act of Congress, and

(2) In alternatively not considering and giving effect to (c) of Section 237 of the Judicial Code.

Appellant respectfully requests a rehearing.

ARGUMENT

The State of Louisiana is as much dismayed by failure to reach the merits of this case as by the decision itself. The administration of her revenue laws is in doubt. This is certainly true with reference to the Federal Revenue laws and with any other community property state with "take up" statutes like Louisiana.

The Court smites us because we did not in words and by name challenge the 14th Amendment. This surprises us as much as it hurts. The parties to this litigation, including the Appellees, (see statement attached) have never regarded the 14th Amendment plea as of controlling consequences. Looking at it from its practical, its dollars and cents standpoint, *it amounts to exactly nothing to the appellees.* This is for the reason that it is a mere *credit* which the State of Louisiana is seeking to capture here—a credit otherwise payable to the Federal Government. Even if the Appellees should win this case, but the Act of Congress is ultimately sustained, the legatees will none the less pay to the Federal Government the *very amount* sought herein by the State of Louisiana. So from Appellees' standpoint the Act of Congress is the source of their trouble and they cannot save what Louisiana here seeks until they have sustained their point that the 5th Amendment renders the statue null.

Surely the legatees are not possessed by an amour for the Federal Government—a desire to ultimately pay it rather than the state.

The original and basic issue was this Act of Congress. Without that act there would be no law suit. Take that act out at any point in this case and the case ends. The attack on this act was the only matter before the trial court. It remained so throughout the proceedings until after argument in the Louisiana Supreme

Court. The appellees (whom the Court solicitously considered were misled) in introducing the plea under the 14th Amendment repudiated the suggestion that merely local problems were involved (R. 18) and said "but on the contrary, expressly reaffirming that this cause involves and depends upon the constitutionality of the federal statute." Thus in the mind of both litigants, the 14th Amendment was a mere concomitant, interwoven and inseparable from the 5th. The Supreme Court of Louisiana in its decision, treated it as inseparable and interwoven and after discussing the 14th Amendment, it turned to the 5th Amendment and disposed of it in a sentence, considering that its discussion on the 14th sufficed for the 5th. The 14th Amendment is the lineal descendant of the 5th Amendment; its language and the governing principles are the same.

(c) Section 237, JUDICIAL CODE

But if we were mistaken, still we urge that it was a likely and excusable mistake. It was sufficiently logical that three Justices of this Court exonerated us and the appellees agree with us and the Justice of the Supreme Court of the State of Louisiana concurs. Such an error was intended to be relieved against by the remedial provision of (c) Section 237 of the Judicial Code.

What were we to do here where the remedy from one part of the decision was an appeal and the other part certiorari? We could not have challenged the 5th Amendment and had a certiorari counted as an appeal, if appeal was indicated. On the other hand because of the apparent permission of (c) Section 237 of the Judicial Code, if we took an appeal and a certiorari was proper in whole or *part*, same would be granted as a matter of course.

But the Court apparently holds that among our appeal papers we should have in express words assigned as error the decision of the Court below under the 14th amendment. *However, it was an appeal we were taking and an assignment of error as to the 14th Amendment would not support an appeal.* It would be utterly foreign to an appeal. Should we, nevertheless, have dumped it in in the face of the Court's insistent admonitions in its rules to brevity and conciseness?

We submit that an honest and forthright lawyer would not dump in matters honestly thought by him to be surplusage. Should he marry the rules of appeal to those of certiorari and thus give birth to a document that is a hodge podge hybrid? If on appeal, to avail himself of (c) Section 237, a litigant be required to comply with one rule of certiorari, why should he not be required to comply with all rules? Admit that such is the case and it will be impossible for a litigant to present a pointed and clear cut document when he is asking for an appeal where certiorari is thought not to be involved, but might be involved.

When the writer was in Washington he had occasion to examine the congressional hearings with reference to the amendment embodied in (c) Section 237 of the Judicial Code. Before the committee appeared several Justices of the Supreme Court and the express reasons for the amendment given by these Justices were to relieve litigants of the consequences of mistakes of their attorneys in choosing between the route of appeal or certiorari. Looking at this case from our standpoint in the most unfavorable light, we have merely misunderstood the basis of the decision below. Is (c) Section 237 of the Judicial Code, a remedial statute, not to be given a sufficiently liberal interpretation in our case where we have made an honest and not illogical error?

To suggest that we do not challenge in its totality the entire

decision below is to ignore reality. Every act we have taken in that case since the decision is implicit with protest against it. Therefore, we believe this Court should allow the appeal to stand, or at least grant certiorari on the appeal papers as relates to the 14th Amendment.

WAS THE 14TH AMENDMENT CHALLENGED?

Looked at liberally, does not the assignment of error (R. 32) suffice to challenge the 14th Amendment? There were present the 5th Amendment, the 14th Amendment and the uniformity clause. The assignment of error contained three paragraphs. The first relates to the 5th Amendment. The third relates to the 5th Amendment and the uniformity clause and what could have the Amendment?

But the Court says that in presenting our designation of points, we confined the issue to the 5th Amendment. But the designation of these points was made after this record arrived in this Court, a month after the assignment of error (August 19, 1943). The pertinent part of the act is:

> "(c) * * * * but the papers whereon the writ of error was allowed shall be regarded and acted on as a petition for certiorari and as if duly presented to the supreme Court *at the time they were presented* to the court or judge by whom the writ of error was allowed:" (italics ours).

The *time* that this matter was presented to the Chief Justice of the Supreme Court of Louisiana was the 17th day of July, 1943. The record as made up at that time and the papers upon which the appeal was granted were comprehended within pages 1 to 33 of the record. The Court under statute should not look beyond July 17, 1943 to determine the sufficiency of the

papers for certiorari. If the Court rules seem to indicate a contrary position they would certainly yield to the statute.

In confining the designation of points to the 5th Amendment, we were simply following our idea that the over-all issue was the Act of Congress, the decision on which under the 5th Amendment would ipso facto dispose of everything else. In other words, we were still trying to obey the Court's order of brevity and pursuing *an appeal*—not pursuing a certiorari. We did weaken, however, when we made assignments of errors in our original brief (pg. 12), so we succeeded in not offending one rule of the Court—Rule 27.

The Court concludes in the last paragraph of the opinion that the decision below may rest on non-Federal grounds. This could not be true, because there were no pleadings raising local issues. Every pleading raised a federal constitutional issue. It is not to be assumed that the Court below based its decision on a point not raised or granted relief beyond the prayer of the prevailing litigant. Is it permissive to speculate what the decision of the court below would have been had local issues been raised?

The courts seem bothered with the thought that there is left unanswered the question as to whether these legatees would have to bear all or part of the total tax, if the whole community is included, overlooking the stipulation in the record (R. 2, paragraph 4) where it is provided:

> "The heirs of the decedent do not contest their legal liability for eighty percent of such tax as may be lawfully due."

The full tax claimed by appellant here is "lawfully due", if the Act of Congress is good against the 5th Amendment.

Finally we draw the Court's attention to the statement of Mr. S. L. Herold, leading counsel for the legatees, appended hereto. This statement was motivated by counsel's generous sympathy for our travail and his commendable dislike for this case to turn on an assumption not resting in fact.

Wherefore, we respectfully pray that a rehearing be granted herein and that the judgment herein before rendered be annulled and set aside and that this Court take this case and dispose of same on the merits.

Further prays for all necessary orders, general and equitable relief.

LEONARD L. LOCKARD,
of Counsel for Appellant.

CERTIFICATE OF APPELLANT

I, Leonard L. Lockard, of counsel for the appellant in the foregoing petition for rehearing, do hereby certify that same is filed in good faith and not for purposes of delay.

LEONARD L. LOCKARD,
of Counsel.

STATEMENT OF S. L. HEROLD OF COUNSEL FOR APPELLEES.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 252

J. HOWELL FLOURNOY, SHERIFF AND EX-OFFICIO TAX COLLECTOR,

Appellant,

versus

SAMUEL G. WIENER, WILLIAM B. WIENER AND JACQUES L. WIENER,

Appellees.

In justice to opposing counsel, whose appeal has been dismissed without mention of certiorari, because of assumed failure on their part to comply with the rules of this Court, we beg, as counsel for appellees, respectfully to join in the prayer of the appellant for a rehearing.

If the judgment below had sustained the constitutionality of the statute under attack, then plainly an appeal on our part would have required specification of the exact errors committed by the lower court in sustaining the Act.

But inasmuch as the decision below held the Act invalid, all that *appellant* needed to bring before the Court was assertion that the statute has legal validity.

Moreover, "the papers whereon the appeal was allowed", consisting of petition for appeal, assignment of errors and separate jurisdictional statement, fully disclose the issues upon which appellant sought to bring the case before this Court.

And in his second assignment of error, we think it plain that appellant did raise the constitutional validity of Section 402(b)(2) of the Federal Revenue Act of 1942 as against the Fourteenth Amendment.

But the opinion here, reflecting upon the sufficiency of the assignment, says:

> "Doubtless because of appellant's disclaimer, in his points to be relied upon, of a purpose to present any but the Fifth Amendment question, appellees have proceeded on argument and in briefs in this Court on the assumption that only the Fifth Amendment[1] question was before us."

But appellees call the attention of the Court to *page 2 of their printed brief*, wherein they expressly take note that the issue of the Fourteenth Amendment is before the Court on the present record, and that if the appeal should be dismissed

> "the case is reviewable by certiorari (28 U. S. C. §344 (b)), and such review would be had 'under the papers whereon the appeal was allowed' (28 U. S. C. §344 (c))."

This appearance is being filed in justice to opposing counsel who believed, as did appellees, that the case is reviewable by this Court on direct appeal, and that, if they be in error as to this, that it is reviewable by certiorari.

Respectfully submitted,

SIDNEY L. HEROLD,
Counsel for Appellee.

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[1] Notwithstanding the language of the two amendments requiring due process is identical, the only difference being that one is a limitation upon the Federal, the other upon the State government.

p 16,

SUPREME COURT OF THE UNITED STATES.

No. 252.—October Term, 1943.

J. Howell Flournoy, Sheriff and Ex-officio Tax Collector, Appellant, *vs.* Samuel G. Wiener, William B. Wiener, and Jacques L. Wiener.	Appeal from the Supreme Court of the State of Louisiana.

[February 28, 1944.]

Mr. Chief Justice Stone delivered the opinion of the Court.

This case comes here on appeal under § 237(a) of the Judicial Code, 28 U. S. C. § 344(a), from a judgment of the Supreme Court of Louisiana, appellant assigning as error that that court had held invalid, as in violation of the Fifth Amendment, § 402(b)(2) of the Revenue Act of 1942, 56 Stat. 942. On considering the jurisdictional statement filed by appellant pursuant to Rule 12 of the Rules of this Court, we postponed decision of the jurisdictional questions to the argument on the merits.

Section 237(a) of the Judicial Code authorizes an appeal to this Court from a judgment of the highest court of the state "where is drawn in question" the validity of a statute of the United States and the decision is against its validity. The error assigned is therefore one cognizable on appeal. The question for our decision is whether, the state court having rested its decision and judgment upon two independent grounds, each adequate to support the decision but only one of which appellant has assigned as error on appeal to this Court, we have jurisdiction to decide either.

Appellees, children and sole legatees of Wiener, who had died a resident of Louisiana, leaving his widow surviving, brought the present proceeding in the District Court for the First Judicial District of Louisiana to establish the amount of the state inheritance tax on the interest acquired by them under the will of decedent. Under state law they cannot be placed in possession of the property inherited by them until they have paid the tax. Act No. 127 of the Extra Session of 1921 as amended by Act No. 44

of 1922; see § 3 of Act No. 119 of 1932. So far as material here, the amount of their liability for the tax depends upon the meaning and application of Act No. 119 of the Louisiana Acts of 1932, Louisiana Code of Practice, Arts. 996.89-996.94, and of § 402(b)(2) of the Revenue Act of 1942. Act No. 119 directs the levy, in addition to existing inheritance taxes, of "an estate transfer tax upon all estates which are subject to taxation under the Federal Revenue Act of 1926". The Act provides that whenever the aggregate amount of all inheritance, succession, legacy and estate taxes actually paid to the several states of the United States in respect to any property owned by the decedent shall be less than 80% of the estate tax payable to the United States under the provisions of the Revenue Act of 1926, the difference between that amount and 80% shall be paid to Louisiana.[1]

Section 402(b)(2) of the Revenue Act of 1942 amends § 811(e) of the Internal Revenue Code, which was derived from § 302(e) of the Revenue Act of 1926, so as to include in the gross estate of decedent for purposes of the federal estate tax, property

"to the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse."

Relying on these statutory provisions appellant, who is charged by state law with the duty of collecting the state inheritance tax, set up by his answer that the State of Louisiana is entitled to recover an inheritance tax equal to 80% of the basic federal estate tax, which by § 402(b)(2) of the Revenue Act of 1942, is to be computed upon the entire community, and prayed judgment against appellees for an inheritance tax so computed.

To this answer appellees interposed pleas that the inheritance tax demanded of them, insofar as it is measured by the interest of the widow in the community, is unconstitutional for want of

[1] The purpose of the Act, declared by § 4, was to secure for the state the benefit of the credit allowed by § 301(b) of the Revenue Act of 1926, 26 U. S. C. § 813(b) which allowed the taxpayer a credit against the estate tax imposed by that Act for estate, inheritance or legacy taxes actually paid to a state or territory or the District of Columbia, and provided that the total credit for such taxes should not exceed 80% of the federal estate tax payable.

the uniformity prescribed by § 8 of Article I of the Constitution, and is a denial of due process, in contravention of the Fifth Amendment, in that it taxes property not belonging to decedent and not acquired by appellees under the will. The District Court sustained these pleas on the grounds assigned and gave judgment accordingly.

It will be observed that although the federal estate tax, laid on all the property included in the taxable estate of the decedent, is payable by the estate,[2] the effect of appellant's contention in both state courts was that Act No. 119 had, by virtue of § 402(b)(2) of the Revenue Act of 1942, imposed an inheritance tax measured by the entire community property and had authorized collection of that entire tax from the decedent's legatees. The case thus presented not only the question whether a tax could constitutionally be imposed on the entire community property on the death of the husband, but also the further question, not necessarily governed by the federal Act, cf. *Riggs* v. *Del Drago*, 317 U. S. 95, whether the entire tax could be collected from those who inherit from the decedent, although they took no interest in the share of the community property retained by the surviving spouse.

On appeal to the state Supreme Court the Attorney General of the United States was allowed to intervene; on the argument there he urged that the validity of § 402(b)(2) of the Revenue Act of 1942 was not in question, but that the only issue before the court was the validity of Act No. 119 under the Fourteenth Amendment, if construed and applied in the manner contended for by appellant. Appellees accordingly were allowed to amend their plea of unconstitutionality so as to plead in the alternative that if Act No. 119 were construed so as to impose on them an inheritance tax measured by the entire community property it would violate the Fourteenth Amendment.

The Supreme Court of Louisiana affirmed the judgment of the District Court but for different reasons. 203 La. 649. It held that "the construction sought to be placed on Act No. 119 of 1932 by the tax collector . . . would render it violative of the due process guaranteed by the 14th amendment to the Constitution of

[2] The tax is made a lien on the gross estate, which includes the entire community property here, Internal Revenue Code § 827(a), and is a personal liability of the wife to the extent of the interest acquired by her, Revenue Act of 1942, § 411.

the United States, since such interpretation would result in the imposition of a tax upon those succeeding to the estate of a decedent measured in part by the property comprising the estate of another, to which the estate of the decedent is in no way related." For this conclusion it relied upon *Hoeper* v. *Tax Commission*, 284 U. S. 206, holding that a state graduated income tax measured by the joint income of husband and wife violated the Fourteenth Amendment. It said that the tax was there held invalid because "any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment".

The Court thus made an alternative decision that either Act No. 119 did not impose on appellees a tax on property not bequeathed to them or that if it did it violated the Fourteenth Amendment. But it also went on to hold that "the limitation placed upon the state by the Fourteenth Amendment is likewise placed on the Federal Government by the Fifth Amendment" and that § 402(b) of the Revenue Act of 1942, which appellant, by interpretation of Act No. 119, had contended was the measure of the tax to be imposed on appellees, is likewise a violation of the Fifth Amendment if interpreted so as to tax the entire community property here.

Appellant, in his assignments of error here, made no mention of the ruling of the state Supreme Court that Act No. 119, as construed and sought to be applied by him, violates the Fourteenth Amendment. He assigned as error the Supreme Court's decision that § 402(b)(2) of the Revenue Act of 1942 violates the Fifth Amendment. He also asserted that it had erred "in denying legal efficacy" to that provision of the Revenue Act which required the valuation of all the community property of decedent and his surviving spouse in the computation of the federal estate tax. But in his "Statement of the points on which he intends to rely", filed pursuant to paragraph 9 of Rule 13 of this Court, he stated, "the only issue before the Court, and the point on which he intends to rely is that the Act of Congress held by the Supreme Court of Louisiana to be unconstitutional, to-wit Section 402(b)(2) of the Revenue Act of 1942, approved October 21, 1942, is constitutional and that the Supreme Court of Louisiana erred in

holding said statute to be violative of the Fifth Amendment to the Federal Constitution."

Rule 9 of this Court's Rules requires the appellant in all cases to file assignments of error "which shall set out separately and particularly each error asserted", and paragraph 9 of Rule 13, requiring the statement of points to be relied upon, provides that "The Court will consider nothing but the points of law so stated". See also Rule 27 par. 6. It is a familiar rule, consistently followed, that upon appeal from a state court this Court will not pass upon or consider federal questions not assigned as error or designated in the points to be relied upon even though properly presented to and passed upon by the state court. *O'Neil* v. *Vermont*, 144 U. S. 323, 331; *New York* v. *Kleinert*, 268 U. S. 646, 651; *Herbring* v. *Lee*, 280 U. S. 111, 117, *Seaboard Airline Ry.* v. *Watson*, 287 U. S. 86, 91; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167, 172; *Jones* v. *Opelika*, 316 U. S. 584, 592. The rule is the same in the case of applications for certiorari. Rule 38, par. 2; *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 179; *National Licorice Co.* v. *Labor Board*, 309 U. S. 350, 357.

There is a special reason why this practice should be followed here. Doubtless because of appellant's disclaimer, in his points to be relied upon, of a purpose to present any but the Fifth Amendment question, appellees have proceeded on argument and in briefs in this Court on the assumption that only the Fifth Amendment question was before us. Appellant's only mention of the impact of the tax on appellees is to say that "they have been victimized by the state law not the federal law". And he has made no effort to sustain the constitutionality of the imposition by the state of the entire burden of the tax on appellees. This is important because on the present record the two questions as to the constitutionality of the state and federal statues are materially different in point of substance and in kind. The Fifth Amendment is relevant only because the federal tax on community property is made the measure of the tax which Louisiana, not the federal government, imposes upon appellees. If the federal tax on community property infringes the Fifth Amendment then obviously that property is not "subject to taxation under the Federal Revenue Act" as the Louisiana Act requires, and there is wanting the taxable subject matter upon which the Louisiana statute purports to im-

pose the tax, namely community property which is subject to a federal tax.

It is not the federal but the state statute which imposes the tax on appellees, and the Fourteenth Amendment question in this case is not merely that the state statute, like the federal statute, imposes the tax on a subject matter which is not constitutionally taxable, but that the state statute does something which, as we have seen, the federal statute does not do, namely imposes on appellees an inheritance tax which includes in its measure some of the community property which they do not receive. As already pointed out, this was the question raised by appellees' supplemental plea of unconstitutionality, allowed and decided by the Supreme Court of Louisiana. By it they challenged, as a violation of the Fourteenth Amendment, the imposition on them of an "inheritance tax" "based or measured upon the value of the entire community". Even though it were decided that the federal statute validly imposes the tax on decedent's estate with its burden distributed among all those entitled to share in the estate as the state law may provide, see *Riggs* v. *Del Drago, supra*, the question would remain for decision whether the Fourteenth Amendment permits the particular distribution for which appellant contends, requiring appellees to bear all the tax although they share in only part of the estate on which it is laid.

But this question is not before us because appellant, by his statement of points to be relied on, has affirmatively excluded it from consideration on this appeal and has limited himself to the different question arising under the Fifth Amendment. In any case we ought not to consider it here because in reliance upon this declaration neither party has briefed or argued it in this Court. Rule 27, paragraph 6 declares that errors not urged in the briefs will be disregarded. And, independently of "technical" rules it is not the habit of this Court to decide important constitutional questions which the parties have not presented, briefed or argued.

It is apparent that the decision of the single question arising under the Fifth Amendment, cannot, in the present state of the record, be dispositive of the case. The only tax here sought to be imposed is the state inheritance tax authorized by Act No. 119. The state court having held that that Act is either inapplicable or, if applicable, is an infringement of the Fourteenth

Amendment, any ruling we could make as to the validity of §402(b)(2) could afford no basis for affirming, modifying or setting aside the decision of the state court that by reason of the invalidity or inapplicability of Act No. 119, the tax demanded cannot be imposed.

Any determination which we might make of the Fifth Amendment question would thus leave unaffected the state court's judgment brought here for review. Our opinion on that subject would be advisory only, since there is nothing before us on which we could render a decision that would have any controlling effect on the rights of the parties. Hence the case stands in the same posture as those in which we have repeatedly held that where the judgment of a state court rests in part on a non-federal ground adequate to support it, this Court will not consider the correctness of the decision which the state court also made of a federal question otherwise reviewable here. *Berea College* v. *Kentucky*, 211 U. S. 45, 53; *Enterprise Irrig. Dist.* v. *Canal Co.*, 243 U. S. 157, 163-4; *Lynch* v. *New York*, 293 U. S. 52, 54-5; *Fox Film Co.* v. *Miller*, 296 U. S. 207, 210-11. In such a case this Court has said that it will not enter "a useless and profitless reversal" "where the same judgment will be rendered by the court below, after they have corrected the error in the federal question." *Murdock* v. *City of Memphis*, 20 Wall. 590, 634-4. Compare *Pugh* v. *McCormick*, 14 Wall. 361, 374. For like reasons we have refused to answer questions certified to us by a lower federal court where it appears that the answer cannot affect the result, *United States* v. *Buzzo*, 18 Wall. 125, 129; *United States* v. *Britton*, 108 U. S. 199, 207; *Lederer* v. *McGarvey*, 271 U. S. 342, 344. See also the rules stated in *New Orleans* v. *Emsheimer*, 181 U. S. 153; *New York Tel. Co.* v. *Maltbie*, 291 U. S. 645; *Lindheimer* v. *Illinois Tel. Co.*, 292 U. S. 151, 176; and in *Hirabayashi* v. *United States*, 320 U. S. 81, 85, and cases cited.

The cause is accordingly dismissed for want of jurisdiction. In the view we take of the case we do not reach the question whether the appeal should not also be dismissed because of doubt whether the decision of the Louisiana Supreme Court as to Act No. 119 rests on a holding that the Act violates the Fourteenth Amendment, or merely that it is inapplicable as a matter of construction of a state statute not reviewable here. With that left in doubt, we could not say that the decision of the state Supreme Court does not rest on a non-federal ground adequate to support

it. Compare *Lynch* v. *New York, supra,* 55; *Honeyman* v. *Hanan,* 300 U. S. 14; *Bakery & Pastry Drivers & Helpers Local* v. *Wohl,* 313 U. S. 572; *New York ex rel. Rogalski* v. *Martin,* No. 187, decided October 11, 1943, with *State Tax Commission* v. *Van Cott,* 306 U. S. 511; *Minnesota* v. *National Tea Co.,* 309 U. S. 551, *Standard Oil Co.* v. *Johnson,* 316 U. S. 481.

Dismissed

Mr. Justice FRANKFURTER, with whom Mr. Justice ROBERTS and Mr. Justice JACKSON concur, dissenting.

If this appeal were dismissed summarily I should remain silent. But opinions on the jurisdiction of this Court must serve as guides for the bar as well as for all other courts. Therefore the reasons for my inability to concur in the Court's views, involving as they do general considerations, call for somewhat detailed expression.

1. The law of the jurisdiction of this Court raises problems of a highly technical nature. But underlying their solution are matters of substance in the practical working of our dual system and in the effective conduct of the business of this Court. While therefore the disposition of jurisdictional questions involves specialized knowledge we are not dealing with problems the answers to which depend on the use of talismanic words or on the observance of rigid forms. On no one I venture to believe has the conviction stronger hold than on me that it is important to postpone constitutional adjudications and therefore constitutional conflicts until they are judicially unavoidable, or to keep them, when unavoidable, within the strict confines of a specific case. That is why we should be uncompromising in observing the limits of our authority and should avoid laxity in assuming jurisdiction. See 49 Harv. L. Rev. 68, 90-107. But the duties of this Court do not hang on the thread of mere verbalism.

2. We do not review a case from a state court which can be supported on a non-federal ground because federal authority ought not to intrude upon the domain of the States. This far-reaching political consideration was decisive even after the Civil War in settling the rule that not only do we not review a case from a state court that can rest on a purely state ground, but we do not even review state questions in a case that is properly here from a state court on a federal ground. *Murdock* v. *City of Memphis,* 20 Wall. 590.

3. The requirement of assignment of errors in order to invoke our reviewing power rests on a wholly different consideration. "The purpose is to enable the court as well as opposing counsel, readily to perceive what points are relied on." *Seaboard Air Line Ry.* v. *Watson*, 287 U. S. 86, 91. Of course, when the error complained of is a rejection of a claim of the invalidity of a state statute under the United States Constitution, the claim must have been effectively pressed before the state court and rejected by it. But the requirement is not for some abracadabra. The nub of the matter is found in *Bryant* v. *Zimmerman*, 278 U. S. 63, 67:

> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefore be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

4. These general considerations bring us to the particular case. Its reviewability here is questioned on numerous grounds. Any one of them would be conclusive. Apparently, however, a cloud of unreviewability is compounded by intermingling doubts on several scores. If the judgment of the Supreme Court of Louisiana can rest on a non-federal ground there is an end of the matter. If that court went off on the constitutionality of a federal statute when that statute was not drawn into question again there is an end to the matter. If the judgment in fact rested on the validity of a state statute urged to be repugnant to the United States Constitution, the case could come here but only if the claim of invalidity was properly presented and duly rejected by the state court. And even then such error could be urged here only if brought before this Court by revealing assignment of errors. If that requirement were not met, again the appeal would call for dismissal.

5. This controversy "concerns the constitutional validity of an act of Congress"—§ 402(b)(2) of the Revenue Act of 1942, 56 Stat. 798, 942—"which is directly drawn in question. The decision depends upon the determination of this issue." *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, 201. This is so, that is, unless we

wish to overrule the *Kansas City Title* case as well as the recent unanimous decision in *Standard Oil Co.* v. *Johnson,* 316 U. S. 481, and adopt the dissenting views of Mr. Justice Holmes in the *Kansas City Title* case, *supra* at 213. In any event, however, the decision of the Louisiana Supreme Court cannot be supported on a non-federal ground and does involve the validity of a state statute under the United States Constitution. Finally the assignment of errors, the order allowing appeal and the statement of points on which appellant relied satisfy the reasons for our Rules 9 and 13(9). All three considerations are intertwined in the distinctive circumstances of this case and they establish our jurisdiction, once the cause of this litigation is kept in mind and our jurisdictional requirements are not turned into formalism "run riot".

6. What then was in issue in this litigation and what issue was determined in the judgment that was brought here? The tax collector claimed that "the heirs of Sam Wiener, Jr., owe an inheritance tax on the entire community estate rather than upon the one-half interest in the community inherited by them" for the reason that

> "by virtue of Act No. 119 of the Legislature of Louisiana for the year 1932, the State of Louisiana is ultimately entitled to recover an inheritance tax against this estate which is equal to eighty per cent of the basic Federal tax as fixed by the Federal Revenue Act of 1926",

and that

> "Congress, in the Revenue Act of 1942, (Title IV, Sec. 402A. 56 Statutes —, Title 26, Sec. 811, U. S. C. A.) provides that the basic Federal Estate Tax is computed upon the entire community and accordingly, the State of Louisiana is entitled to an amount equal to eighty per cent of the basic Federal Estate Tax so calculated." (R. 8)

The claim of the State for an inheritance tax in a sum equal to 80% of the tax due to the Federal Government as computed in part under § 402(b)(2) was thus based on the interdependence between the Louisiana Act No. 119 and § 402(b)(2) of the Revenue Act of 1942. The latter was incorporated by reference into the former. The two became inseparable for purposes of construction—in a case like the present a decision involving Act No. 119 inescapably depended upon the determination of the validity of § 402(b)(2).[1]

[1] Section 2 of Act No. 119 of the Louisiana Acts of 1932 provides that "Whenever the aggregate amount of all inheritance, succession, legacy and estate taxes actually paid to the several states of the United States in respect

Such was the issue tendered by the State, and issue was joined by the appellees' plea of unconstitutionality:

> "notwithstanding anything to the contrary that may be contained in the Federal Revenue Act of 1942, approved on October 21, 1942, there may not be included in the estate of the decedent, subject to the Federal Estate Tax (and consequently subject to the provisions of the State Inheritance Tax under Act 119 of 1932) any property except that which was owned by the decedent at the instant of his death, and by his death transmitted to his heirs." (R. 9)

In this plea the constitutional invalidity of the federal act was challenged as follows:

> "Such statutory provision is in contravention of and violative of the Fifth Amendment to the Constitution of the United States, in that its application would deprive these appearers of their property without due process of law by its imposition of taxes upon them, based both upon an arbitrary inclusion in the estate of the decedent of property which did not belong to him and upon the application thereto of graduated rates based upon values arrived at by reference to such other property." (R. 10)

7. Putting to one side the claim of unconstitutionality of § 402(b)(2) for want of uniformity, this is the issue which persists throughout the litigation—the issue arising from the claim of constitutional invalidity under the Fifth Amendment of the method of computing the federal estate tax according to the Amendment of 1942 inasmuch as the state inheritance tax is concededly ascertained through the ascertainment of the federal estate tax. This was the issue raised by the pleadings in the First Judicial District Court of Louisiana; this was the issue tendered by

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to any property owned by such decedent shall be less than eighty per cent (80%) of the estate tax payable to the United States under the provisions of the said Federal Revenue Act of 1926, but not otherwise, the difference between said amount and said eighty per cent (80%) shall be paid to the State of Louisiana."

Section 302 of the Revenue Act of 1926 as amended by § 402(b)(2) of the Revenue Act of 1942, includes in the gross estate property, "To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition." 44 Stat. (part 2) 9, 70; 56 Stat. 798, 942.

the agreed statement of facts before that court (R. 11, particularly par. 4); this was the issue which that court decided against the State because it found a statute of Congress "violative of the Fifth Amendment to the Constitution of the United States in that its application here would deprive the heirs of the decedent of their property without due process of law" (R. 13); this was the issue formulated by both parties in their appeal to the Supreme Court of Louisiana (R. 14, 16); on the basis of this issue that court invited the Attorney General of the United States to appear as *amicus curiae*. After the Attorney General, so appearing, suggested for the first time that "the tax liability here in issue is only that imposed by the state statute", appellees

> "Without in any manner conceding the correctness of that position, but on the contrary expressly reaffirming that this cause involves and depends upon the constitutionality of the Federal Statute,"

amended their plea of unconstitutionality, with the State's consent, by adding also an attack upon the validity of the state statutes "either alone or in conjunction with the Federal Statute" (R. 18).

By this process the case reached the Supreme Court of Louisiana. No one can read that court's opinion and be left in any doubt that Louisiana Act No. 119 of 1926 and § 402(b)(2) of the Revenue Act of 1942 were treated inseparably and the validity of the former made to depend on the fate of the latter. Two passages give the pith of the opinion:

> "Now, because of the Congressional adoption of Section 402(b)(2) of the Revenue Act, amending Section 811(e) of the Internal Revenue Code of 1939, 26 U. S. C. A. Int. Rev. Code § 811(e), the tax collector of Caddo parish is contending inheritance and estate taxes in this state, under Act No. 119 of 1932, must be computed on the basis established in that section".
>
> "we are asked to place an interpretation on Act No. 119 of 1932 and Section 402(b)(2) of the Revenue Act of 1942 that would result in the inclusion in the estate of the managing partner of an interest in the community partnership to which he never had any claim and which was, in fact, during his lifetime and is now, owned by his wife." 203 La. 649, 656, 669-70.

On this showing the lower court concluded that § 402(b)(2) offends the Due Process Clause of the Fifth Amendment, and therefore the reliance of the State upon § 402(b)(2) as read into

Act No. 119 made the latter Act offensive to the Due Process Clause of the Fourteenth Amendment.

8. The invalidity, because wanting in due process, of § 402(b)(2) infused into Act No. 119, is the issue that runs like a silver thread unbroken and unalloyed through this litigation as it took its course from the First Judicial District Court of Louisiana to the State Supreme Court and from there to this Court. This makes it abundantly clear why the errors were assigned as they were—claims of error in holding that § 402(b)(2) is unconstitutional and in denying

> "legal efficacy to the provisions of Section 402(b)(2) of the Federal Revenue Act of 1942 as requiring the valuation of all of the community property standing in the name of the decedent, Sam Wiener, Jr. in the computation of the Federal basic estate tax; and, consequently, in the computation of the inheritance tax due to the State of Louisiana which, under the statute of the state, is required to be eighty percent of the amount of the Federal basic estate tax." (R. 32, Assignment of Errors, 2.)

Because such was the issue and because the judgment of the Supreme Court of Louisiana determined that issue, the order allowing appeal recites that "there was drawn in question the validity of § 402(b)(2) of the Federal Revenue Act of 1942", (R. 33). Such having been the issue and such its determination, appellant naturally set it forth in his statement of the points on which he intended to rely. (R. 35.)

9. If a federal claim was drawn in question in *Smith* v. *Kansas City Title Co.*, *supra*, and *Standard Oil Co.* v. *Johnson*, *supra*, it was not less drawn in question in this case. If the earlier two decisions are to continue to stand, I am unable to make a differentiation between them and the record before us.[2] Much is to be said for the reasoning of Mr. Justice Holmes in the *Kansas City Title* case in urging that the incorporation of a federal act into a state law

[2] The *Kansas City Title* case was a suit by a Missouri shareholder of a Missouri trust company to enjoin the directors from buying bonds of Federal Land Banks and Joint Stock Land Banks on the theory that the statutes authorizing the banks and bonds being unconstitutional, the bonds were not lawful securities for investment purposes. The Court held that this was a statement of a cause of action arising under the laws of the United States. The meaning of the Court's holding is clearly indicated by the view which was rejected. "The defendant is a Missouri corporation and the right claimed is that of a stockholder to prevent the directors from doing an act, that is, making an investment, alleged to be contrary to their duty. But the scope of their duty depends upon the charter of their corporation and other laws of Missouri. If those laws had authorized the investment in terms the plaintiff

nevertheless makes the suit, for purposes of our jurisdiction, one arising under the state and not under the federal law. But his view was rejected. In the recent *Standard Oil* case we had an opportunity to adopt his view and reject that of the Court in the *Kansas City Title* case. Instead, we unanimously applied the reasoning of the *Kansas City Title* case that where a decision under state law necessarily involves the construction or validity of federal law the determination of such federal law in the application of state law gives rise to a federal question for review here.

10. In any event the decision below did not go off on a non-federal ground. It cannot be said of this case as was true of a case like *Fox Film Corp.* v. *Muller*, 296 U. S. 207, 211, that the case "in effect, was disposed of before the federal question said to be involved was reached. *Chouteau* v. *Gibson*, 111 U. S. 200; *Chapman* v. *Goodnow*, 123 U. S. 540, 548. A decision of that question then became unnecessary; and whether it was decided or not, our want of jurisdiction is clear." We have seen that the issue that was framed after the tax collector's return to the rule was exclusively a question of constitutionality under the United States Constitution, and the judgment of the two State Courts was a determination of that issue. There never was any suggestion that the controversy involved merely a construction of the state law except a construction that necessarily raised a federal constitutional question. It was deemed to be a question under the Fifth Amendment of the Constitution until the Attorney General of the United States suggested that the Fourteenth Amendment was at stake. But even on that assumption, the case was decided on a federal and not on a non-federal ground, namely the invalidity of

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would have had no case, and this seems to me to make manifest what I am unable to deem even debatable, that, as I have said, the cause of action arises wholly under Missouri law. If the Missouri law authorizes or forbids the investment according to the determination of this Court upon a point under the Constitution or acts of Congress, still that point is material only because the Missouri law saw fit to make it so." 255 U. S. at 214.

In the *Standard Oil* case, a ruling by a state court that United States Army Post Exchanges were not federal agencies in deciding the applicability of a state sales tax which did not apply to sales to Government agencies, was held to be a decision of a federal question reviewable here. "For post exchanges operate under regulations of the Secretary of War pursuant to federal authority. These regulations and the practices under them establish the relationship between the post exchange and the United States Government, and together with the relevant statutory and constitutional provisions from which they derive, afford the data upon which the legal status of the post exchange may be determined. It was upon a determination of a federal question, therefore, that the Supreme Court of California rested its conclusion that, by § 10, sales to post exchanges were not exempted from the tax." 316 U. S. at 483.

the State's claim because of want of due process under the Fourteenth Amendment. Since, however, the claim of invalidity was sustained we can take the case only on certiorari. § 277(b) of the Judicial Code.

11. The question then is whether the federal ground was adequately assigned to satisfy our Rules 9 and 13(9).[3] This brings us again to the rationale of these rules. "The purpose is to enable the Court as well as opposing counsel, readily to perceive what points are relied on." *Seaboard Air Line Ry.* v. *Watson*, 287 U. S. 86, 91. Is there any doubt that everybody knew what was the issue on which the Supreme Court of Louisiana passed and what was the issue on which the State of Louisiana and the Government desire us to reverse that decision? *Seaboard Air Line Ry.* v. *Watson, supra,* illustrates the true functions of assignment of errors and affords an example of the kind of situations in which the rule comes into operation. It is not fair to the administration of justice—to the work of this Court and counsel taking part in its business—that appeal papers here should not enable us to know clearly and quickly what it is that is complained of and that we are asked to undo:

> "The substitution of vague and general statement for the prescribed particularity sets the rule at naught. . . . And as the rule makes for convenience and certainty in the consideration of cases the court may, and generally it will, disregard a specification that is so uncertain or otherwise deficient as not substantially to comply with the rule, even if the opposing party raises no question and treats it as adequate. The quoted assignment amounts merely to a complaint that the supreme court erred in not reversing the judgment of the trial court because 'in the trial of this case' the 'scope and effect' of the section deprived appellant of its

[3] Rule 9: "Where an appeal is taken to this court from any court, the appellant shall file with the clerk of the court below, with his petition for appeal, an assignment of errors, which shall set out separately and particularly each error asserted. No appeal shall be allowed unless such an assignment of errors shall accompany the petition."

Rule 13(9): "When the record is filed, or within fifteen days thereafter, the appellant shall file with the clerk a definite statement of the points on which he intends to rely and a designation of the parts of the record which he thinks necessary for the consideration thereof or a designation of those parts considered unnecessary, whichever is more convenient, with proof of service of the same on the adverse party. . . . The statement of points intended to be relied upon and the designations of the parts of the record to be printed shall be printed by the clerk with the record. . . . The court will consider nothing but the points of law so stated. . . ."

property in violation of both the due process and equal protection clauses. An allegation of error could scarcely be more indefinite. It does not identify any ruling at the trial or specify any basis for the assertion of deprivation of constitutional right. It presents no question for our consideration." *Seaboard Air Line Ry.* v. *Watson*, *supra* at 91.

In this case, unlike the *Watson* case, there was not a "vague and general statement", an "indefinite" allegation of error. From beginning to end all concerned knew the precise issue that this litigation raises—whether § 402(b)(2) meets the guaranty of due process, in view of the dependence of the state act upon that federal provision. Surely we would have to take this case if Louisiana had specifically assigned as error the view that the Supreme Court of Louisiana took of the Fourteenth Amendment in relation to taxing community property. But since, as the Louisiana Supreme Court said, the issue under the Fourteenth Amendment is precisely the same in this situation as that under the Fifth Amendment, to throw out the case because "Fourteenth Amendment" was not written is to make our jurisdiction the slave of words.

12. If the decision below can really be said to rest on a non-federal ground, no assignment of errors could cure the defect

* "Appellant having assigned as error the decision of the Louisiana Supreme Court holding the Federal Act invalid, the case is properly an appeal, and appellant could have included in his assignments of error any other denial of federal right whether or not capable in itself of being brought here by appeal. Prudential Insurance Co. *v.* Cheek, 259 U. S. 530, 547. Or he could have filed a petition for writ of certiorari in addition to his appeal. Columbus & Greenville Ry. Co. *v.* Miller, 283 U. S. 93, 98. But since he failed to raise or brief in this Court any question as to the validity of the Louisiana statute under the Fourteenth Amendment, we have no jurisdiction of the case either on certiorari or on appeal, and there is no occasion for the application of Judicial Code, sec. 237 (c), 28 U. S. C. sec. 344 (c). See Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, page 40, and cases cited."

[illegible] ever taxes are constitutionally due from the estate. We ought not to create a constitutional grievance which the parties themselves have never entertained in order to avoid adjudication of the only question which has been in the case from the beginning.

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